

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
Civil No. 2:08-cv-05169(WJM)-MF

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IN RE URETHANE ANTITRUST : TRANSCRIPT OF PROCEEDINGS  
LITIGATION : - Trial -  
- - - - -x

Newark, New Jersey  
March 30, 2016

B E F O R E:

THE HONORABLE WILLIAM J. MARTINI,  
UNITED STATES DISTRICT JUDGE,  
And a Jury

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Pursuant to Section 753 Title 28 United States Code, the  
following transcript is certified to be an accurate record as  
taken stenographically in the above entitled proceedings.

S/WALTER J. PERELLI

WALTER J. PERELLI, CCR, CRR  
Official Court Reporter

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## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
PAT DAWSON				
By Mr. Bernick	24		119	
By Mr. Schaefer		89		

## VIDEOTAPED DEPOSITION PLAYED IN OPEN COURT

Stan Pauley.....page 8

William Long.....page 8/23

## Colloquy Between Court and Counsel

Starting Page Ending Page

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9 22

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133 \* \_

1 March 30, 2016

2 (Trial resumes - Jury not present.)

3 THE DEPUTY CLERK: All rise.

4 THE COURT: Good morning.

5 MR. JOHNSON: Good morning.

6 THE COURT: Be seated, please.

7 We were waiting for a juror, so while we're doing that  
8 I thought I would address the charts and the submissions by the  
9 defendant. Just a moment.

10 Just in summary, Dow is offering a number of exhibits  
11 and charts which were prepared by Dr. Ginn, who also provided  
12 an affidavit as to how she went about to prepare those charts  
13 and summaries, and they're being offered pursuant to Rule 1006,  
14 the rule dealing with summaries.

15 These charts, as best I can discern, some of which  
16 were submitted to plaintiff as recently as Sunday of this past  
17 week and others which were submitted, let's say, within several  
18 weeks as best I can estimate as to when they were actually  
19 submitted, by that, it was -- but it was close to the date this  
20 trial was to begin that they were submitted. Rule 1006  
21 requires that the summaries be based on data that's  
22 discernible, and that's data that underlies the proposed  
23 summaries.

24 The Court -- the concern I have with these summaries,  
25 and I've expressed them yesterday, was they're not in this

1 Court's opinion simply summaries. If you read Dr. Ginn's  
2 affidavit it would appear certainly that she uses the term  
3 "calculate," she expresses there that she did not include all  
4 of the data. I note Dow states that the data is the same as  
5 the data of Dr. Marx that was used in compiling these charts  
6 and exhibits.

7 The problem is the plaintiffs have not had a chance to  
8 provide them to Dr. Marx to confirm what's in these summaries  
9 and the accuracy of the summaries and whether or not the manner  
10 in which Dr. Ginn compiled them was simply a summary or was it  
11 an expression of an expert opinion.

12 I think it leans more towards a supplement of an  
13 expert opinion than a summary. They are not the types of  
14 summaries I think most of us are familiar with, which are  
15 easily discernible based on submissions of some underlying data  
16 and then the summary simply summarizes; that's the best term I  
17 think I can use. I mean, typically what we have with phone  
18 records, you would have hundreds of phone calls made and then  
19 the summary would reflect in January of a certain year there  
20 were 50 phone calls made to this phone number, and you don't  
21 have to go through all the 50 phone calls and add them up; or  
22 bank records, where typically you have hundreds of checks being  
23 made out to a certain person or a party in a case, a fraud, and  
24 then the summary simply says what clearly what everybody  
25 understood to be the underlying data: In January, 10 checks

1       went to Bob Jones; 15 checks went to Mary Smith. That's not  
2       the case here in this Court's opinion.

3               And there's legal authority in this circuit which  
4       talks to this situation where the calculations are better  
5       described as a synthesis rather than a summary of underlying  
6       evidence, and those cases are Einhorn vs. AT&T Corp., and  
7       College Source, both of which I can give you the cites to or my  
8       clerks will give you the cites to.

9               The real concern I have is that the plaintiffs never  
10       had a timely situation -- or a time to analyze these graphs in  
11       any detail, and we were not going to do it -- and that's why I  
12       didn't need to have Dr. Ginn here -- we were not going to do it  
13       by way of almost like a deposition or a Daubert hearing  
14       regarding the underlying basis for these charts.

15              I don't know, and I haven't heard a good reason why  
16       these charts weren't provided to plaintiff in a more timely  
17       manner. I know the Pretrial Order. I know Mr. Streeter said  
18       yesterday the Pretrial Order allowed them to submit summaries  
19       subsequent to the Order, but that doesn't mean the summaries  
20       are admissible in evidence, it just allowed me to, if you have  
21       a reasonable summary and it's really a summary, it could be  
22       provided, but that's not the case here in this Court's opinion.  
23       So for that reason, those summaries will not be admitted into  
24       evidence.

25              All right. Go ahead, Mr. Bernick.

1           MR. BERNICK: If I could just ask a question, your  
2 Honor.

3           With respect to Dr. Raiff's data, I understand the  
4 Court's ruling. For the record, I think that a lot of them are  
5 summaries and I think we designated which ones were prior to  
6 the Pretrial Order, but I can see it's not really material to  
7 your Honor's decision and I understand your Honor's decision.  
8 The exception that I want to point out -- and I'm assuming your  
9 Honor has ruled on this -- but I want to be clear -- 8693 are  
10 the financial data charts, and these are simply charts that  
11 chart the financial data from Dow's financial reports and these  
12 were furnished prior to the Pretrial Order. They do not  
13 involve -- they are literally a summary of the data points from  
14 the underlying financials which the plaintiffs have had. This  
15 document is identical except it extends back in time to 1995.  
16 It's identical to the summaries that were used in the Class  
17 trial, including specifically with Mr. Dawson who is here to  
18 testify this morning. I would say that we can provide the  
19 foundation through him.

20           MR. JOHNSON: If I may, we have no objection --

21           THE COURT: Don't interrupt.

22           MR. JOHNSON: I was going to say, we have no  
23 objection.

24           THE COURT: Oh, okay.

25           MR. JOHNSON: So I thought we could end this.

1 THE COURT: That's a good interruption.

2 MR. JOHNSON: Thank you, your Honor.

3 THE COURT: That makes a good interruption.

4 I think you're satisfied. Right.

5 MR. BERNICK: I'm always satisfied.

6 So can we offer and have received 8693 as a summary?

7 THE COURT: Yes.

8 MR. JOHNSON: Yes.

9 MR. BERNICK: On that note --

10 THE COURT: No, no, thanks.

11 All right. Then let's bring out the jury.

12 After this deposition, this video, Mr. Bernick or Mr.  
13 Streeter, what do you have next?

14 MR. STREETER: We have one more video about a half  
15 hour long of Mr. Long, and then Mr. Dawson is going to testify  
16 live.

17 THE COURT: And how much longer do we have on this  
18 video, about 45 minutes?

19 MR. STREETER: About an hour and a half. It was two  
20 hours total.

21 THE COURT: We only did a half hour yesterday.  
22 Fine. Let's bring out the jury.

23 THE DEPUTY CLERK: Please rise for the Jury.

24 (Jury Present.)

25 THE COURT: Good morning. Please be seated. Thanks

1 for being here.

2 All right. We're going to continue with the video,  
3 please.

4 (The videotaped deposition of Stan Pauley resumes  
5 being played in open court.)

6 (The playing of the videotaped deposition is stopped.)

7 MR. BERNICK: Your Honor, if we could just have a  
8 very, very brief sidebar, it will just take half a minute.

9 (Off the record discussion at the sidebar.)

10 (In open court.)

11 THE COURT: All right. Let's proceed.

12 (The videotaped deposition resumes being played in  
13 open court.)

14 (The playing of the videotaped deposition is stopped.)

15 THE COURT: That concludes the testimony?

16 MR. STREETER: Your Honor, next we'd like to play the  
17 testimony of William Long who worked at Dow, and part of his  
18 testimony was previously played.

19 THE COURT: All right. Do that for a few more minutes  
20 and then we'll a take break. Okay?

21 (The videotaped deposition of William Long is played  
22 in open court.)

23 (The playing of the videotaped deposition is stopped.)

24 THE COURT: Mr. Streeter. How much longer do we have  
25 of Mr. Long?



1 MR. STREETER: I think it's about 12 minutes.

2 THE COURT: Well take a break then.

3 Ladies and gentlemen, we'll take a break until 11:00  
4 o'clock. Okay. Thank you for your attention. We'll see you  
5 then.

6 THE DEPUTY CLERK: Please rise for the Jury.

7 (The Jury leaves the courtroom.)

8 THE COURT: Who do we have after Mr. Long?

9 MR. BERNICK: Mr. Dawson who is waiting outside.

10 THE COURT: How long will that be?

11 MR. BERNICK: I think I'll probably be an hour and 15  
12 or 20 minutes on direct.

13 THE COURT: Okay. All right. Then you'll have cross?  
14 Who is going to do the cross?

15 MR. JOHNSON: Mr. Schaefer is going to take the cross.

16 THE COURT: All right. Then after Mr. Dawson?

17 MR. BERNICK: We're back to videos.

18 THE COURT: Okay.

19 MR. JOHNSON: Your Honor, if I may, as you may recall,  
20 we had an off-the-record discussion about the two charts that  
21 appeared in Mr. Pauley's deposition.

22 THE COURT: Oh.

23 MR. JOHNSON: Yes, Mr. Pauley's deposition that your  
24 Honor is going to be ruling on to their admissibility, the  
25 charts that Mr. Bernick got him to write on --

1 THE COURT: Yeah.

2 MR. JOHNSON: -- that we looked at earlier.

3 THE COURT: Number 28?

4 MR. JOHNSON: Right.

5 THE COURT: Or 23. Right? 23?

6 MR. BERNICK: 23.

7 MR. JOHNSON: 23 is one of them.

8 THE COURT: What was the other one again?

9 MR. BERNICK: 18. That just had a couple things on  
10 it. Capacity.

11 THE COURT: I have 23.

12 MR. STREETER: I will hand you up --

13 THE COURT: Let me see -- or 18.

14 MR. STREETER: We can put it on the screen. This is  
15 8622.

16 MR. JOHNSON: I'm just adding to the record. They  
17 suggested they would submit to you the relevant transcript  
18 pages and that you could look at that with the exhibit and  
19 decide whether you were going to allow that to go to the jury.

20 And I just want to make another comment with respect  
21 to 23 -- if you could put that up, please -- which I think is  
22 pertinent to your decision, your Honor.

23 Now, Mr. Bernick represented to Mr. Pauley that this  
24 chart represented the actual prices paid by Carpenter from  
25 these various suppliers during the time periods indicated.

1           That was a totally false representation. It is not,  
2           in fact, the net net prices.

3           You may recall, your Honor, this is the exact same  
4           chart that Mr. Bernick tried to use with Dr. Marx during her  
5           testimony in this court before this jury, and Dr. Marx pointed  
6           out that this chart was totally wrong in that it showed the  
7           Lyondell prices, the yellow line, to be the highest price.  
8           And, in fact, Lyondell was the lowest price during this time  
9           period.

10           Then in the course of the examination by Mr. Bernick,  
11           he proved through looking at a contract that Lyondell was, in  
12           fact, the lowest cost producer that Carpenter bought from. He  
13           established that through a contract that he showed Mr. Pauley,  
14           and then he turns back to this exhibit and makes Mr. Pauley  
15           write on there the Lyondell/Carpenter advantage at the top of  
16           the chart, which plainly shows the Lyondell price being higher  
17           than any of the competitors at the time.

18           It is stunning to me. I understand why Mr. Pauley  
19           would have been confused. He didn't remember much about this  
20           and he was just following the instructions. But Mr. Bernick  
21           had just gotten from this man that Lyondell was the lowest  
22           price during the period, proved it from a contract, then turned  
23           to this chart which shows them at the highest price of the  
24           period and made him write that on there.

25           And I wanted to bring that to the attention of the

1 Court because this exhibit should not go to the jury.

2 MR. BERNICK: Your Honor, very briefly. If you'll  
3 actual -- actually what was said -- what was said to the jury  
4 is not -- it's just pages 214 and 215 --

5 This is page 214 going over to 215. And it's right  
6 after the Exhibit 23 -- no, that's not -- that's not the same.

7 (Mr. Bernick confers with the tech off the record.)

8 THE COURT: What are you reading from?

9 MR. BERNICK: This is designations.

10 MR. STREETER: The Pauley deposition.

11 THE COURT: Oh, the deposition?

12 MR. BERNICK: Yes, the deposition.

13 And I was very careful, and interestingly -- well --

14 THE COURT: You'll have to keep your voice up. I  
15 can't see it.

16 MR. BERNICK: You can't see it? I'll just read it,  
17 your Honor. Or I can -- I think we can read it.

18 It says: (Reading) I want to show you -- maybe that  
19 is where you picked up.

20 THE COURT: Keep your voice up.

21 MR. BERNICK: (Reading) I want to show you another  
22 document that reflects data from Dr. Raiff's report, and it was  
23 prepared by our expert using the -- and I think you're going to  
24 find this chart an interesting chart -- using the data from Dr.  
25 Raiff with respect to median prices.

1 I didn't say "actual prices," I said "median prices."

2 And I'm going to modify it when I give it to you  
3 because it has one error that is actually our error, so I will  
4 confess to it being an error. 23 says Dr. Raiff's weighted  
5 median prices versus Dr. Elzinga's price increase  
6 announcements.

7 I'm going to scratch off Dr. Elzinga's price  
8 announcements because we've taken that off the chart. This  
9 just reflects Dr. Raiff's weighted median prices charged to  
10 customer for TDI.

11 That's all that it says, and this is 100 percent  
12 accurate.

13 Now, there are all kinds of ways to show price. You  
14 can show price as a median average, which is what he used, but  
15 this is what was used in the model, it was used in the model;  
16 that is, this whole way of calculating is the industry number.  
17 All we did is take the same industry number and put it here.  
18 That's number one.

19 Number two, while it's true that there are further  
20 deducts, that's true even of their own charts they showed to  
21 the jury that we talked about yesterday. There are always  
22 further deducts. Not all of the deducts can even be traced  
23 back to individual transactions and individual prices. So when  
24 they say these are the actuals, net net net, even the chart  
25 they showed your Honor yesterday is not actually the actual net

1 net net for many of the transactions.

2 So I simply use the same methodology to create this  
3 document. Never represented that it was the actual net net  
4 cost.

5 If we go back to then Exhibit 23 -- if we can just  
6 blow it up.

7 Your Honor observed exactly how those entries were  
8 made, exactly. And in each and every single case "non  
9 supplier" was the word that he used. In fact, I said -- what  
10 did you say?

11 THE COURT: All right, that part, I heard that, I  
12 heard that.

13 MR. BERNICK: So when it comes to Lyondell, that was  
14 simply the date of the purchase order. In terms of when those  
15 prices started to kick in, I don't know that they started to  
16 kick in right away, but you can see the Lyondell price line  
17 starts to be lower. And as it comes along now, right here you  
18 can see it starts to skim inside all of the other prices and  
19 for the most part stay below them.

20 Why? That's exactly what the Lyondell purchase order  
21 said. It says that Lyondell always has to be 2 percent below  
22 market. That's exactly where they started to go, exactly. But  
23 the purchase order is dated here, and that's why it was marked  
24 there.

25 And I will further add, further add, I never used the

1 actual differences. I simply showed that there were  
2 differences, and he agreed that there were differences. I used  
3 this to summarize exactly what was going on. Bayer: Non  
4 supplier; BASF: Non supplier --

5 THE COURT: All right.

6 MR. BERNICK: -- and the like. That's what its  
7 purpose was, and the jury saw it all.

8 THE COURT: That Exhibit Number 23, is that the same  
9 one as DX-8627?

10 MR. STREETER: Yes.

11 THE COURT: How come you didn't object to it during  
12 the Pretrial Order?

13 MR. JOHNSON: I think we did. I think we did, your  
14 Honor.

15 THE COURT: Not that I'm reading, unless you can show  
16 me. I don't see it.

17 So why don't you tell me where in the Pretrial Order  
18 it shows that you objected to that.

19 By the way, I mean, you had considerable time -- when  
20 was this video deposition taken?

21 MR. BERNICK: I was going to say 2013.

22 THE COURT: Right, okay.

23 MR. BERNICK: And I showed this to Dr. --

24 THE COURT: Okay, Mr. Bernick, I heard, I heard.

25 When you -- you know --

1           MR. JOHNSON: While they're checking on that, may I  
2 respond though?

3           THE COURT: Briefly. But go ahead.

4           I mean, if it wasn't objected to in the Pretrial  
5 Order, you know, I'll determine whether it's admissible. It's  
6 certainly going to be usable as demonstrative evidence at the  
7 very least, okay? At the very least it's going to be that.

8           MR. JOHNSON: We did have an objection in the Pretrial  
9 Order, your Honor.

10          THE COURT: Not the one I was looking at. Page 10?

11          MR. JOHNSON: This is in our exhibit -- on the exhibit  
12 list we set forth all the objections in the Pretrial Order.  
13 It's an attachment to the Pretrial Order.

14          THE COURT: All right. I'll double-check, but --

15          MR. JOHNSON: And if I may, your Honor --

16          THE COURT: Go ahead.

17          MR. JOHNSON: -- there was a bit of disassembling  
18 there. The first point Mr. Bernick made is irrelevant, and  
19 that is, he removed the Elzinga flags, and that wasn't the  
20 focus of my point that I was making.

21          Rather, the focus of my point was that this chart,  
22 this whole examination was intended to portray the actual  
23 prices paid by Carpenter from these individual suppliers during  
24 this time period and how different they were. And when this  
25 chart, the very same chart was shown to Dr. Marx -- could we



1 bring up 215, page 215 from the transcript of Dr. Marx's  
2 testimony before this Court? Can you do that?

3 The top of this page, please.

4 And Mr. Bernick presented this to Dr. Marx, and she  
5 said to him then: "Actually you can't tell from that because  
6 they're not the net prices. Those aren't taking into account  
7 the discounts and rebates."

8 And it goes on to say --

9 MR. SCHAEFER: Keep going down actually to 216, top of  
10 216.

11 THE COURT: When you did the deposition of Mr.  
12 Pauley --

13 MR. JOHNSON: Yes.

14 THE COURT: -- did you bring that out in the  
15 deposition?

16 MR. JOHNSON: Mr. Leveridge objected to the entire  
17 examination on this exhibit and we objected to the use of this  
18 exhibit, and we thought it was deceptive then. I obviously  
19 didn't know then that he was going to put it before the jury.  
20 But this is why we brought this up before with your Honor, to  
21 say that. Before this deposition was played we brought this  
22 question up to your Honor's attention and said that we wanted  
23 to keep these out. And you decided -- and we understood your  
24 decision -- that you were going to allow it to be shown but  
25 that you would reserve --

1 THE COURT: I still am.

2 MR. JOHNSON: -- on whether or not this stuff would  
3 come in.

4 But the point is, Mr. Bernick then went through an  
5 examination to show that Lyondell was the bottom rock lowest  
6 cost producer that Carpenter bought from during this time  
7 period, so-called displaying the Carpenter advantage, and then  
8 he had him write that down on that exhibit at a higher price  
9 point.

10 And for him to disassemble and say that that price  
11 wasn't in effect during the time period when the yellow line  
12 was shown above everybody else's is simply incorrect. And he's  
13 using a deceptive, wrong chart to establish what points through  
14 Mr. Pauley that should not come before the jury.

15 These are exactly the same types of charts that your  
16 Honor has just excluded.

17 THE COURT: When you had the conference with Judge  
18 Pisano --

19 MR. JOHNSON: Yes.

20 THE COURT: -- you conferred with Judge Pisano, did  
21 you bring out the fact that through -- was there testimony in  
22 the record that this chart doesn't include discounts and  
23 rebates? Did you bring that out?

24 MR. JOHNSON: The --

25 THE COURT: I mean, was there anything in the

1 record --

2 MR. JOHNSON: No. The procedure --

3 THE COURT: Wait, wait.

4 MR. JOHNSON: Sure.

5 THE COURT: Was there anything in the record for Judge  
6 Pisano to consider regarding this objection that you may have  
7 had with the line of questioning of Mr. Pauley?

8 MR. JOHNSON: No, Judge Pisano was not ruling on the  
9 admissibility of exhibits.

10 THE COURT: I understand that.

11 MR. JOHNSON: And we didn't -- no, we did not bring  
12 that to his attention.

13 THE COURT: Okay. I mean, was there anything in the  
14 deposition testimony by way of redirecting of Mr. Pauley or --  
15 you know, who's deposition was it of Mr. Pauley?

16 MR. BERNICK: It was our deposition, and Ms. Trulove  
17 conducted an examination at the conclusion of the examination.

18 THE COURT: For the plaintiff?

19 MR. BERNICK: For the plaintiff.

20 THE COURT: So did the plaintiffs' counsel at that  
21 time try to rehabilitate Mr. Pauley by showing him and  
22 saying --

23 MR. JOHNSON: No. It was Mr. --

24 THE COURT: Wait -- do you understand that this median  
25 price doesn't reflect the highest price, it reflects -- it

1 doesn't take into account -- it's the highest price, it doesn't  
2 take into account rebates or discounts?

3 MR. JOHNSON: It was Mr. Leveridge who did the  
4 examination.

5 THE COURT: Right.

6 MR. JOHNSON: And the answer is no. Because remember,  
7 this is being presented at a deposition and it's the first time  
8 Mr. Leveridge has seen this thing.

9 THE COURT: Okay.

10 MR. JOHNSON: He doesn't have his experts there to  
11 tell him that it's wrong. He doesn't know that.

12 It is only after we later examine this thing with our  
13 experts that we realize what they're doing is misusing the  
14 median price information to divide it between the suppliers in  
15 an improper way and not using the rebates and the signing  
16 bonuses, which he brought out very well in the examination, the  
17 500,000 and the \$600,000, those checks that were written, and  
18 all of that stuff is not reflected in these numbers, which  
19 makes this whole chart improper for trying to tell the jury  
20 that these were the prices that Carpenter actually paid.

21 And we have maintained that objection throughout these  
22 proceedings. And we recognize we had to deal with this  
23 deposition and it was there and so we brought it up to your  
24 Honor. We told you what our problem was and we asked you to  
25 rule on it. And you said, well, we'll show it and see where it

1 goes.

2 You have now seen it and I'm making the argument to  
3 you as to why it should not be given to the jury in evidence.  
4 They've seen it, I recognize that. But he shouldn't be able to  
5 make a closing from that document.

6 MR. BERNICK: Your Honor, that -- that's the whole  
7 problem with the argument, is that they have an expert, the  
8 expert has known about it for three years and specifically  
9 testified and set out their position in this case before the  
10 jury, so they heard her answer to this document. We disagree  
11 with it, but they've heard her answer. This data, again, was  
12 used directly in the first stage of the model without  
13 alterations. But --

14 THE COURT: When was the deposition taken again? What  
15 year?

16 MR. BERNICK: This deposition was I believe -- I know  
17 it was in 2013 at the end of the year.

18 And it was then put into -- it was then used in the  
19 examination of Dr. Marx I believe towards the early part of the  
20 following year. It was then put into --

21 THE COURT: During that examination did she state that  
22 this was not an accurate reflection of the actual prices that  
23 were paid?

24 MR. BERNICK: No. She said that she didn't know, she  
25 wasn't familiar with the document. She said she didn't know.

1           But she had the document. And, in fact, your Honor,  
2           actually the sequence is, she got the deposition. She then  
3           incorporated the deposition of Mr. Pauley into her report. She  
4           had a report that specifically refers to this. And nowhere in  
5           the report does she take on these kinds of issues. She  
6           actually refers to it. After she did the report I then took  
7           her deposition and she insisted that notwithstanding the fact  
8           that the deposition was in her report, she didn't understand  
9           what the data was.

10           The jury has now heard her view. The jury is now  
11           seeing our view. This is directly evidence that comes from  
12           their expert as part of their model.

13           Counsel says, the jury should not be able to consider  
14           it as evidence. That's basically an argument that says: We  
15           don't like this evidence. It goes -- their position goes to  
16           the weight but they're saying: We don't like it so it can't go  
17           back.

18           Well, but they already have Dr. Marx's testimony. If  
19           they want to say that this chart is misleading, they can -- Dr.  
20           Marx has already said it. We disagree with her but she's  
21           already said it.

22           THE COURT: We'll take a 15-minute break. We'll see  
23           you back here at 11:20. Okay.

24           MR. JOHNSON: Thank you, your Honor.

25           (A recess is taken.)

1 (Proceedings resume - Jury not present.)

2 THE DEPUTY CLERK: Please remain seated.

3 THE COURT: Are we all set?

4 We'll bring out the jury. We'll finish up with the  
5 video, right.

6 Okay, Gail.

7 THE DEPUTY CLERK: Please rise for the Jury.

8 (Jury present.)

9 THE COURT: All right. Be seated, thank you.

10 (The playing of the videotaped deposition of William  
11 Long resumes being played in open court.)

12 (The playing of the videotaped deposition is stopped.)

13 THE COURT: That completes it?

14 MR. BERNICK: Yes. We're ready to call our next  
15 witness, Mr. Pat Dawson, if that's okay with the Court.

16 THE COURT: Sure.

17

18 P A T D A W S O N, called as a witness, having been first  
19 duly sworn, is examined and testifies as follows:

20

21 THE DEPUTY CLERK: Please state and spell your name  
22 for the record.

23 THE WITNESS: It's Pat Dawson. D-a-w-s-o-n.

24 THE COURT: Good morning.

25 THE WITNESS: Good morning.

1 THE COURT: If you can, just be sure to speak know the  
2 microphone as you answer the questions, please.

3 THE WITNESS: All right.

4 THE COURT: You can proceed.

5 MR. BERNICK: Thank you very much.

6 (Counsel confer off the record.)

7 DIRECT EXAMINATION

8 BY MR. BERNICK:

9 Q I'm sorry, Mr. Dawson.

10 MR. BERNICK: I apologize to the Court and to the  
11 jury.

12 Good morning to all.

13 Q Mr. Dawson, could you tell us where it is that you work?

14 A I currently work at the Olin Corporatoin.

15 Q Okay. And where is that located?

16 A It's located in St. Louis, Missouri.

17 Q I see. And where are you actually based?

18 A I'm based in Chicago, Illinois.

19 Q So now you're talking to a Windy City boy here myself. So  
20 are you a Cubs fan?

21 A Yes, I am.

22 Q Okay. What's your position at Olin?

23 A I'm the Executive Vice President for Olin along with being  
24 the President of the Epoxy Division and Olin International.

25 Q How long have you held that position?



1 A Since October 6th, 2015.

2 Q Okay. And what is the business of Olin?

3 A Olin is in the chlorine caustic soda business, a variety of  
4 other types of chlorine products like bleach. They also have a  
5 Winchester Division, which is used for, you know, making  
6 shotgun shells and ammunitions, and they've been in that  
7 business for over 150 years.

8 Q Okay. What was your job before you joined Olin?

9 A Before I joined Olin, I was President of the Epoxy business  
10 for Dow Chemical and also in charge of working on special  
11 projects in Asia-Pacific.

12 Q How long did you work for the Dow Chemical Company?

13 A Thirty-five years.

14 Q And where were you based at the Dow Chemical Company at the  
15 time that you left in 2015?

16 A I was based in Chicago, Illinois.

17 Q Why did you decide to leave Dow?

18 A I worked on a part of a carve-out of the chlor-alkali  
19 business and the epoxy business from Dow Chemical, and working  
20 on that carve-out and separating that business out of Dow, Olin  
21 Corporation bought that business and I decided at that point in  
22 time to leave Dow and go with the business that I had been  
23 running along with the rest of the chlorine envelope that Olin  
24 then purchased from Dow Chemical.

25 Q Were you able to take with you the people who were part of

1 your team at Dow?

2 A I took my entire team with me from Dow to Olin.

3 Q Today, do you have ties or relationships with the Dow

4 Chemical Company?

5 A Yes. The relationship is a buy/sell relationship. Dow  
6 Chemical is actually a customer of Olin and Olin is a customer  
7 of Dow. We also have a very significant relationship at our  
8 manufacturing sites in Freeport, Texas where these assets have  
9 always been located. So we work very closely with Dow and Olin  
10 at some large manufacturing sites, such as Freeport, Texas.

11 Q You say "assets." Are you talking about --

12 A Manufacturing plants.

13 Q Manufacturing plants.

14 Have you come here to testify at Dow's request?

15 A Yes, I have.

16 Q Could you tell the jury why it is that you decided to come  
17 and testify at Dow's request?

18 A Well, Dow was a great place for me to work for 35 years,  
19 and I know this is an important issue and I wanted to support  
20 Dow in this case.

21 Q Also good for the customer relationship?

22 A Of course.

23 Q Okay.

24 What was your -- I think you told us, but if you could  
25 just go back over it again -- your last position at Dow was in

1 Asia-Pacific?

2 A Yes. That was before -- I was the President of  
3 Asia-Pacific for Dow Chemical from 2009 until about October of  
4 2013, and then in '13 is when I came back to work on the  
5 special projects along with running the epoxy business as the  
6 president of epoxy.

7 Q Okay. Were you -- did you know Patrick, another Patrick,  
8 also in Asia, Patrick Ho during the course of your work at Dow?

9 A Very well. Patrick and I worked together in different  
10 capacities over a number of years.

11 Q Were you aware that Mr. Ho himself worked in Polyurethanes  
12 at a point in time in the past?

13 A Yes, I was aware of that.

14 Q I'd like to get you situated in time.

15 MR. BERNICK: If we could pull up one of the boards,  
16 please. Thanks very much.

17 Q And I'm simply going to use the TDI board that we have  
18 here, and I think you're familiar with these, the jury is as  
19 well. These are -- these boards reflect prices for TDI and a  
20 bur-for price that Dr. Raiff worked on and Dr. Marx worked on,  
21 and I'm going to ask you about it. But the first thing I want  
22 is for you to just find out time periods.

23 So the jury has heard from Mr. Ho, who is in the '94  
24 to late '97 time period; and Mr. Wood who is there after and  
25 ultimately leaves at the end of 2003.

1                   And Mr. Fischer; did you know Mr. Fischer?

2       A     Yes, I did.

3       Q     The jury has heard he worked for Mr. Wood.

4                   Stephanie Barbour; did you know Stephanie Barbour?

5       A     Yes.

6       Q     Did you know that she used to work for David Fischer?

7       A     Yes, I'm aware of that.

8       Q     And then Marco Levi, we also heard from Marco Levi by  
9     videotape. Did you know Marco?

10      A     Yes, I knew Marco.

11      Q     And you knew he used to work for David Fischer at the same  
12     time?

13      A     That's correct.

14      Q     So when was it that you became involved in urethanes,  
15     polyurethanes?

16      A     I was appointed as a Vice President of Polyurethanes in  
17     January of 2004.

18      Q     And how long did you stay in that position?

19      A     I was in that position from 2004 until about September of  
20     2009.

21      Q     Okay. So it goes off the chart here. This is '09.

22                   You were there at least for the end of '08?

23      A     Yes.

24      Q     Okay. I'm going to ask you -- all my questions are going  
25     to be focused on this period of time.

1           Let me kind of get to this by talking about  
2       circumstances that existed when you became involved at the  
3       beginning of 2004.

4           At that time was it this team of Fischer, Levi and  
5       Barbour that had been in place?

6       A    They had been in place.  And when I came into that job they  
7       were going to different -- Bob Wood was moving on to a  
8       different company, Stephanie Barbour was moving on somewhere  
9       else, and David Fischer was still working on special projects,  
10      and we were in the process working together transitioning.

11      Q    Okay.  I think the jury has heard about a restructuring.  
12      Were you familiar with the restructuring that took place at Dow  
13      Chemical at that time; that is, in the early part of 2004?

14      A    Yes, it was a major restructuring of the entire company, it  
15      was also a major restructuring of the polyurethanes business  
16      within Dow Chemical at that point in time.

17      Q    We'll talk about this in a little more detail in a minute,  
18      but what kind of shape was the polyurethanes business, in  
19      particular, in when you took over the beginning of 2004?

20      A    It was in bad shape.  The performance of the business from  
21      a profitability standpoint was not acceptable, and  
22      fundamentally I was brought in and then brought a team in to  
23      correct that, to improve the business.

24      Q    Okay.  Now I want to get down to the details of your role  
25      and also a few questions relating to Ms. Barbour.

1           With respect to your role, you told us that David  
2   Fischer -- that Stephanie Barbour had already -- was already  
3   essentially gone from the company. David Fischer was kind of  
4   in a transition role. What was your connection to the jobs  
5   that they used to have, if any?

6   A   Yeah. It's very common when you go through any transition  
7   to want to spend a little bit of time with the people who had  
8   been there, right, to learn from them, to learn what was going  
9   on, their thoughts, how they were running the business. And so  
10   I probably spent the most time with David Fischer; I spent a  
11   little bit of time with Bob Wood; and did talk on the telephone  
12   with Stephanie Barbour just to get a knowledge of their current  
13   thinking of the business and what their thoughts were about  
14   what needed to be done to improve the business, what they had  
15   tried to do in the past to improve it.

16           So it was a -- it was a transitional period there of  
17   probably 20 to 30 to 45 type days.

18   Q   Okay. In terms of your job, what was the relationship  
19   between the job that you took on and the duties that Bob Wood  
20   used to have?

21   A   They were pretty much the same responsibilities that Bob  
22   had. We did restructure -- my role was restructured in a  
23   little bit different way than the way Bob did the job. My role  
24   was not just to run the entire -- and have the responsibility  
25   for the profit/loss of polyurethanes, but my responsibility was

1 also to run the day-to-day business of the isocyanates  
2 business, the TDI and the MDI. So it was more like a  
3 player/coach type of a role in running the polyurethanes  
4 business, which was different than the way Bob Wood had run the  
5 business.

6 Q Okay. So you had part -- did you have all of Bob Wood's  
7 job or the polyurethanes part of it?

8 A The polyurethanes part, I had that responsibility.

9 Q And David Fischer's job, did you have all or a part of  
10 David Fischer's job?

11 A I had -- that job was also being done by people who then  
12 reported to me.

13 Q Right. Okay. So part of his duties gets split down --

14 A Gets split down with other people. And then I took the  
15 direct responsibilities of Stephanie Barbour.

16 Q Okay. And then what about Marco?

17 A Marco, that job was eliminated and Marco actually moved on  
18 to take a different roll over in Europe.

19 Q Okay.

20 A And that job was, again, restructured in a way that I had  
21 other people who were reporting to me who had that  
22 responsibility that Marco had had before.

23 Q With respect to Stephanie Barbour, the jury has heard some  
24 testimony regarding her files or what used to be her files.

25 What contact, if any, did you have with what used to

1 be Stephanie Barbour's files when you came on board during this  
2 transition period, if you could just tell the jury?

3 A Sure. I eventually had access to all of Stephanie's files.  
4 Stephanie and I did spend some time on the telephone talking  
5 about those files and what she had been doing. It took me a  
6 few weeks to get access to those files simply because some of  
7 the systems, the information systems in Dow had not been  
8 changed yet. And David Fischer was still there, she had been  
9 reporting to David. So I actually had to have David give  
10 permission to our Information Technology Group to release those  
11 files to me, which eventually I had access to those files after  
12 a few weeks.

13 Q With respect to those files, who -- you said David Fischer  
14 was the person you had to get approval from. But who actually  
15 had custody of those files?

16 A Stephanie had custody of those files, and it was in a file  
17 server, you know, so there was a section in the Polyurethanes  
18 Data Information Group where those files resided. And she had  
19 custody of that, those files when I came in, and I just needed  
20 computer access to get to those files. And it was just a short  
21 transition period that it took in order to get access to those  
22 files through David and our Information Technology Group.

23 Q But it was the Information Technology Group that kind of  
24 had to give you the keys?

25 A Yes, they had the keys to have to put the right pass codes



1 in for me to eventually then get that information.

2 Q Did you come to learn that a preservation -- a  
3 preservation -- I don't want to say "order," but a preservation  
4 hold had been put on those files prior to the time that you  
5 accessed them?

6 A Yeah, they were being preserved and they were being  
7 preserved for the transition so that the new team coming in  
8 would have access to those files.

9 Q Now, obviously you're not suggesting that somehow you knew  
10 what the history of those files had been prior to that time?

11 A I did not.

12 Q Okay.

13 A I did not know any history. I had never been in  
14 Polyurethanes before -- before taking the responsibility in  
15 January of '04.

16 Q Did you come to work with those files over time?

17 A Yes, I did.

18 Q Did you find anything that gave you a concern about  
19 antitrust or competition issues?

20 A No concerns about antitrust issues, but a lot of concerns  
21 about the health of the business and the profitability of the  
22 business.

23 Q Okay. So, I now want to go to this period of time and fill  
24 out this chart here. And the questions that I want to pose to  
25 you basically deal with the condition of the business when you

1       took it over. And we'll kind of make -- we'll create a box  
2       something like this when you took it over (writing on board),  
3       and then another box that basically deals with any changes that  
4       took place that you observed when you were there.

5               So it's kind of "take over" --

6               THE COURT: Mr. Bernick, when did he take over, 2004?

7               THE WITNESS: Yes.

8               MR. BERNICK: Yes.

9               THE COURT: All right. Are those boxes supposed to  
10       relate to this chart in any way?

11              MR. BERNICK: Yeah, the whole purpose is, he's going  
12       to talk about this price line.

13              THE COURT: Okay. Well, on the box on the left it  
14       says he took over in 2000 -- I can't see it.

15              MR. BERNICK: Took over -- "take off" it actually  
16       said. Took over. So he took over -- I'm kind of trying to  
17       draw the arrow --

18              THE COURT: I don't see the numbers on the bottom.

19              MR. BERNICK: It says the beginning of 2004.

20              THE COURT: That's 2004?

21              MR. BERNICK: Yes, 2004. I'm going up from 2004 and  
22       I'll have him talk about the condition of the company when he  
23       took over, and then the condition of the company, the PU  
24       business.

25              THE COURT: All right.

1           MR. BERNICK: And then afterwards, what changes if  
2 any --

3           THE COURT: No, I just was wondering what the boxes  
4 reflected.

5           MR. BERNICK: This is during --

6           MR. SCHAEFER: Your Honor, sorry to interrupt. And  
7 we'll see where this goes. But the box on the left -- and I  
8 can't exactly see where the box on the left starts and  
9 finishes, but if Mr. Bernick is planning to ask the witness  
10 about conditions in the business prior to January of 2004 when  
11 he wasn't involved, this witness doesn't have any personal  
12 knowledge of what was going on prior to his taking over the  
13 business.

14          THE COURT: Let's see what the questions are.

15          MR. BERNICK: I'll lay the foundation.

16          THE COURT: Let's hear the questions.

17 BY MR. BERNICK:

18 Q So, Mr. Dawson, tell us whether or not it was part of your  
19 duties when you took over to learn the condition of the  
20 business that you were taking over.

21 A Yes. It's very standard protocol when you take on a job to  
22 try to learn from the past of what the market conditions were,  
23 what was going on in the marketplace so you can get a really  
24 good feel for where the business had been, and then it gave you  
25 a very good understanding of where you didn't have knowledge

1 currently coming into the business in January of '04, to  
2 basically say, well, what's the present situation. And then  
3 that's the basis where you start formulating a future strategy  
4 to change and improve the profitability of the business.

5 Q So again, would it be fair to review documents for that  
6 purpose?

7 A Absolutely. A lot of documents for that.

8 Q Did those documents predate your involvement in  
9 Polyurethanes?

10 A Yes.

11 Q Did you talk with people who were involved in the business?  
12 I think you already told us the fact you talked to Mr. Fischer?

13 A I talked to many people who had been in the business over  
14 the years to learn from them, to learn about the business, to  
15 learn about customers, to learn about how -- the market  
16 conditions. So that's very common to do when you're taking  
17 over a business to run

18 Q Can you run a business when you're taking over; can you run  
19 a business without undertaking the responsibility to learn its  
20 condition and its history?

21 A It wouldn't be advisable to not take the time to study  
22 history before you start making decisions about what you're  
23 going to do today or tomorrow.

24 Q The facilities that were involved in the polyurethanes  
25 business when you took over, were those facilities, did they

1 just come into existence or did they have a history?

2 A The facilities were unchanged. The facilities were pretty  
3 much the same in the past as the ones that I was inheriting  
4 coming into the job in January of '04.

5 Q Okay. What about the customer relationships, were they all  
6 of a sudden brand new or did they have a history as well?

7 A A long history, those were all very long customer  
8 relationships, which is not uncommon at all in a business like  
9 this.

10 Q The technology, was the technology all brand new or did it  
11 have a history?

12 A The same technology fundamentally. There was no -- no real  
13 differences in the technology.

14 Q The market conditions; we're going to talk about the extent  
15 to which they changed, but did you have to learn about the  
16 history of market conditions?

17 A Yeah. It's really important to understand, you know, how  
18 much capacity or how much supply of product is out there in the  
19 marketplace, very important to understand the demand for that  
20 supply or capacity that you have in your plants, very important  
21 to know both sides, the supply and the demand, not just on a  
22 U.S. basis, but on a global basis. So you really have to  
23 understand that, whether it be in Europe, Asia, Latin America  
24 or in the U.S.

25 Q Now, you told the jury that part of your job was to try to

1 correct conditions or problems that existed. Do you recall  
2 saying that to the jury just now?

3 A That's right.

4 Q Is there any way you could do that without learning the  
5 history of those problems?

6 A It would be very hard to do that. And again, you could be  
7 very shortsighted and you could miss opportunities to improve  
8 the business if you didn't have a good understanding of the  
9 past.

10 Q Okay. When you came on board and you undertook to learn  
11 this history, I think you've told us how it is that you went  
12 about doing it, but could you give us an overview of what you  
13 found concerning the condition of the business in polyurethanes  
14 beginning with -- give me an overview because we're going to  
15 get into it in more detail -- but TDI, MDI, and polyols?

16 A Right. The conditions that I observed is that in TDI there  
17 was a lot of excess capacity. People had built too much  
18 capacity in TDI and that capacity was not being utilized. And  
19 I also observed that that was a time when some of us may recall  
20 the price of oil and gasoline was going up a lot. And so a lot  
21 of our raw materials that we make these products from come from  
22 oil, which also is a source for gasoline. So those raw  
23 material prices were going up tremendously, there was excess  
24 capacity of TDI, and prices were very depressed as well as  
25 profit margins being very depressed.

1 Q What about MDI and polyols?

2 A MDI also had been overbuilt but not as bad as TDI. So it  
3 also had excess capacity. One thing that was a little bit  
4 different about MDI versus TDI is MDI, there was better demand  
5 for that product. Because in MDI, you use MDI combined with  
6 the polyol to make products that go into, like, refrigerators  
7 or automotive, areas that were growing. So MDI had better  
8 growth and demand for it, but it was still an excess -- excess  
9 supply but not as bad as TDI.

10 The polyols I would say were also in oversupply. And  
11 in polyols the demand was growing tremendously at that time out  
12 in Asia-Pacific, so we were shipping a lot of that polyol out  
13 to Asia-Pacific to help better utilize those assets in the  
14 United States.

15 Q Okay. I want to ask you some specific questions. First of  
16 all, with respect to customers:

17 What was your observation concerning what had happened  
18 to the customer base for polyurethanes as of the time that you  
19 took over?

20 A Yeah. The customer base was getting smaller from the  
21 standpoint that there were fewer customers, but there were  
22 bigger customers. So there was a lot of consolidation that was  
23 going on with these customers. So a lot of these customers  
24 were consolidating in order to get more pricing leverage to try  
25 to get better prices from suppliers, and they were

1 consolidating too because they needed to improve their cost  
2 position to be more competitive.

3 So it's very common, you know, as you get bigger to be  
4 able to lower your cost, and that's what the customers were  
5 doing.

6 Q Okay. So the customers -- let me just ask -- were these --  
7 were these facts that you observed, were they all of a sudden  
8 new or was it your understanding that they had gone back over a  
9 period of time?

10 MR. SCHAEFER: Objection, your Honor, to the extent  
11 he's asking the witness about what the customers were trying to  
12 do or what their motivations were, he can't testify to that.

13 MR. BERNICK: I'm not asking that at all, I'm asking  
14 about the way in which they were doing business as he observed  
15 it.

16 THE COURT: I'll allow the question.

17 Go ahead.

18 BY MR. BERNICK:

19 Q As you understood those facts, did you understand that they  
20 were brand new, or did you understand that they had a history?

21 A These are facts that had been evolving over the past  
22 several years. So as I talked to customers in my role of  
23 understanding what their demand would be, what kind of outlook  
24 they had, my observation is this consolidation had been  
25 occurring for a number of years and was continuing at the time



1 I came into the job.

2 Q I want to show you Defendant's Exhibit 1170, the first  
3 page. It's already in evidence.

4 MR. BERNICK: If we could pull up -- if you could pull  
5 up in the third section there where it says "Second."

6 MR. SCHAEFER: I'm going to object to that. To the  
7 extent Mr. Bernick was asking just some general questions about  
8 what the witness saw when he was reviewing the documents, I  
9 think that would be okay and I didn't object there. But now if  
10 we're going to start going through specific documents that were  
11 prepared and generated three years prior to this witness'  
12 involvement in the business, I think that's too much. And he  
13 couldn't possibly testify to specific supply and demand  
14 conditions at that point in time or what customers were doing.

15 THE COURT: All right, counsel.

16 Just one moment.

17 Mr. Bernick, this document is in evidence. Correct?

18 MR. BERNICK: Yes.

19 THE COURT: All right.

20 MR. SCHAEFER: Well, it's in evidence and we don't  
21 object to the document itself, but --

22 THE COURT: Let me hear the question. Go ahead.

23 BY MR. BERNICK:

24 Q Do you see where it says, "Second, the commanding position  
25 of our customers who, due to their size, have tremendous

1 leverage on price"? And that's Mr. Fischer in MDI. You see  
2 that?

3 A Yes, I do.

4 Q Was that consistent or inconsistent with the understanding  
5 that you came to about the history of this issue when you  
6 joined the polyurethanes business?

7 THE COURT: This document was produced in October 16,  
8 2001. Correct?

9 MR. BERNICK: That's correct. He's talking about the  
10 history and his understanding, and all I'm asking if this was  
11 consistent with what he learned and understood we came into the  
12 job.

13 THE COURT: I'll allow it. Go ahead.

14 A So again, coming into the job, part of what you do is you  
15 go out and you talk to your customers. And as I talked to our  
16 customers it was very clear that the statement rang very true  
17 with a number of customers in the automotive industry, which is  
18 a very competitive industry, and they talked about why they  
19 were consolidating. And one of the obvious reasons that, you  
20 know, you consolidate too is to improve your cost position.  
21 And so this was very common knowledge in the industry, very  
22 common -- it was a very common dialogue within the industry  
23 associations that this trend continued to intensify as I came  
24 into this role.

25 Q Okay. I want to talk now about competition.

1           Did you come to have an understanding of the  
2 competitive -- competitive conditions in the market and how  
3 they had evolved over time?

4       A    Of course.

5       Q    And how did you become familiar with that?

6       A    We do a lot of market research.  It's very common to do  
7 market research on your competitors, it's very common to get  
8 information through your customers about your competitors'  
9 capabilities.  Any time you compete you need to know what's  
10 happening with your competition.  So this is a very common,  
11 routine procedure to learn about the strengths, the weaknesses,  
12 the opportunities, the threats that your competition creates.

13      Q    Okay.  What was your own understanding as you joined about  
14 whether this was a competitive business or not, polyurethanes?

15      A    Highly competitive business.  You had BASF and Bayer, two  
16 very strong German companies.  Actually the father of the  
17 isocyanates business was Otto Bayer who discovered and invented  
18 isocyanates 70, 80 years ago, and so they were very strong  
19 competitors.

20           Huntsman was another very strong competitor.  Huntsman  
21 had bought the polyurethanes business from a company by the  
22 name of ICI, which is Imperial Chemicals out of Great Britain,  
23 and they were also an excellent, strong competitor.  And so  
24 between Bayer, BASF, Huntsman and Dow Chemical, those four  
25 companies competed vigorously in all aspects of the

1 polyurethanes industry and the value chain.

2 Q If we go up one paragraph in Exhibit DX-1170, this is again  
3 Mr. Fischer writing in October of 2001 --

4 MR. SCHAEFER: Your Honor, I'm going to object again  
5 here, that it's a very different situation. If he's talking  
6 about what the competitive conditions were when he took over,  
7 that's one thing. But here again he's asking the witness about  
8 what the competitive situation was back in October 2001, which  
9 was three years before he got involved. And there's no  
10 foundation for the fact that he even reviewed this specific  
11 document at any point in time, although of course anyone could  
12 do that.

13 MR. BERNICK: My question again will not -- will be  
14 simply the understanding that he came to when he joined the  
15 company in January -- joined Polyurethanes in January of 2004.  
16 It's exactly the same.

17 THE COURT: When did you first see this document?  
18 Have you ever seen it before today, Mr. Dawson?

19 THE WITNESS: I've seen this document before today.  
20 And, quite frankly, this is a part of the transition that David  
21 Fischer and I went through when I was taking on the job. He  
22 was trying to help me come up to speed on the fundamentals of  
23 what was going on out there. So this was a pretty standard  
24 procedural type of a document to want to cover when you're  
25 transitioning.

1 THE COURT: Even though it goes back to 2001 and you  
2 came in in 2004?

3 THE WITNESS: Of course. Of course. It's not  
4 uncommon to review that kind of history. It's very important  
5 to understand that kind of history.

6 MR. SCHAEFER: Your Honor, there's a gap in this chart  
7 here where they've had a witness who came and testified about  
8 '94 to '97 --

9 MR. BERNICK: Your Honor, this is --

10 MR. SCHAEFER: -- and Mr. Bernick testified -- not  
11 testified -- rather represented --

12 THE COURT: Okay, counsel, counsel, okay.

13 Go ahead, Mr. Bernick.

14 BY MR. BERNICK:

15 Q So again, we'll go back to the same question. Was the  
16 competition in the industry important, an important area for  
17 you to study when you joined in 2004?

18 A It's critical to know who your competition is and what you  
19 can do to beat your competition in order to improve the  
20 performance of your business.

21 Q In order to understand the nature of the competition, tell  
22 the jury whether or not you can do that by just taking a look  
23 at the last quarter or the last six months, or would you have  
24 to go back in time to understand how competition came to be  
25 that way?

1 A It's very important to know the history. Just as I stated  
2 about Otto Bayer being the father of isocyanates, MDI and TDI,  
3 it's important to know that kind of heritage because that gives  
4 you a very good insight into what the strengths of your  
5 competitors are. And so it's a very fundamental part of  
6 competing, understanding your business, and in this case,  
7 making changes to improve the profitability of the business.

8 Q Is this what we see from this exhibit; that is, in 2001,  
9 DX-1170, is it consistent or inconsistent with your  
10 understanding of the history of competition in the few years  
11 that preceded you?

12 MR. SCHAEFER: Objection, foundation, lack of personal  
13 knowledge.

14 THE COURT: All right. Go ahead.

15 Q Go ahead.

16 A Please restate your question.

17 Q Is it consistent or inconsistent with the understanding  
18 that you formed when you joined the business?

19 A It's very consistent.

20 Q Okay.

21 MR. BERNICK: I think, your Honor, in the interest of  
22 time I'll move on. I've got more documents but I'm prepared to  
23 try to expedite this.

24 Q So, I want you to -- I want to ask the question about the  
25 TDI, the condition of the TDI market in particular.

1           What was the condition, as you understood it -- I'm  
2 going to show you -- maybe just do it this way. Exhibit 5280  
3 in evidence.

4           MR. BERNICK: If we could, first of all, go up to the  
5 top and just get the date.

6 Q This is June 12 of 2003. Right, Mr. Dawson?

7 A Yes, that's correct.

8           MR. BERNICK: And if we could go back down to the --  
9 that heading right there.

10 Q That's from Mr. Fischer to the DL PU PLT.

11           What that would that be?

12 A That was the Polyurethanes Leadership Team. So this is the  
13 leadership team that David Fischer was sending this memo to  
14 within Dow Chemical.

15 Q And this is three -- six months before you took over?

16 A That's correct.

17           MR. BERNICK: If we could take us to first paragraph.

18 Q It says: "Attached is a message from Bob."

19           That would be Bob Wood?

20 A That's right.

21 Q "...on his current perspective on the performance of his  
22 business portfolio. As a major contributor to the overall  
23 portfolio, this is a call to arms for polyurethanes, PU. We,  
24 for a variety of reasons such as hydrocarbons costs" -- and we  
25 talked about that?

1 A That's right.

2 Q They're going up, down or staying the same?

3 A Up.

4 Q -- "...TDI in general, weak market demand, we are dismally  
5 behind where we need to be in 2003. With five months down, we  
6 are clearly in a crisis over our performance and need to act  
7 upon it as the leadership of the business."

8 Do you see that?

9 A Yes.

10 Q Was that consistent with what you saw and found when you  
11 came on board in the beginning of 2004?

12 MR. SCHAEFER: Objection. Foundation.

13 THE COURT: I understand.

14 You can --

15 A Yes, that's way found. Actually the business was losing  
16 almost a million dollars a day.

17 Q I want to go to DX-5596, which is in evidence --

18 MR. BERNICK: Actually it's pre-admitted. I guess  
19 we'll offer it.

20 MR. SCHAEFER: The same objection on foundation basis,  
21 but there's no objection to the document itself.

22 THE COURT: The document is in evidence. Go ahead.

23 MR. BERNICK: I said it's pre-admitted, so we're  
24 offering it.

25 THE COURT: Okay.



1 MR. BERNICK: Okay, thank you.

2 BY MR. BERNICK:

3 Q Showing you DX-5596, is this a month later from Mr. Fischer  
4 to Mr. Wood?

5 A That's correct.

6 Q And as you see it's July 19 of 2003?

7 A That's right.

8 MR. BERNICK: Again, let's go down to the second  
9 paragraph, third sentence. Actually the last sentence where it  
10 says, "More than." The second paragraph, "More than." Right?

11 Q It says: "More than anything, we can't seem to outrun the  
12 damages from TDI each quarter and remain in a desperate state  
13 of needing the assets to run."

14 What does "assets to run" mean?

15 A That's our plants, the plants that make TDI.

16 Q -- "...and run reliably to get out from under much of the  
17 costs which hit our books."

18 Again, is that consistent with what you found when you  
19 came on board?

20 A Yes.

21 Q I want to show you what is marked as DX-4754. I'll just  
22 put it up on the screen.

23 MR. BERNICK: And just highlight that first -- yeah.  
24 Down, down.

25 This is not in evidence, your Honor. Not

1 pre-admitted.

2 Q And is this a document that you reviewed at our request?

3 A Yes.

4 Q At our request before you came here to testify?

5 A Yes.

6 MR. SCHAEFER: Your Honor, we're going to object again  
7 here on two grounds: First --

8 MR. BERNICK: Your Honor --

9 MR. SCHAEFER: -- the date. Again it's four years  
10 before he took over; and in this particular document it's not  
11 pre-admitted and we have objections to the document also.

12 MR. BERNICK: I'll create a foundation for making the  
13 proffer.

14 THE COURT: Let me see the question. Go ahead.

15 MR. BERNICK: He wants to see the question.

16 Do you want to rehear the question?

17 THE COURT: Yes, please.

18 Q The question is: Is this a document that was generated and  
19 maintained in the ordinary course of business by Dow Chemical?

20 A Very common.

21 Q Okay. It says: "Polyurethanes Business Review Document."  
22 Is that the kind of document that's generated in the ordinary  
23 course of business at Dow?

24 A Very standard procedure.

25 Q Having a look at the document, is this a document that you

1 know specifically based upon its content, its format and the  
2 author on behalf of the Polyurethanes Leadership Team, is this  
3 a document specifically which you -- which is a document that  
4 was generated and maintained in the ordinary course of  
5 business?

6 A Yes.

7 Q Have you reviewed the document to determine whether this  
8 relates to the matters that you came on board to deal with in  
9 January of 2004?

10 A Yes.

11 MR. BERNICK: We offer it.

12 THE COURT: All right. I'll allow it. It's in  
13 evidence. Go ahead.

14 MR. BERNICK: Thanks.

15 Q I only want to show one thing, which is on page 3, under  
16 "Raw material consolidation - a necessary evolution," and I  
17 want to focus on the last two sentences of that paragraph.

18 It says: (Reading) We now have four global players,  
19 BASF, Bayer, Huntsman-ICI, and Dow, which are fairly equal in  
20 the eyes of all of the customers, achieving equal price  
21 realization and supplying nearly 70 percent of global demand.  
22 All three global competitors and three others are capable of  
23 matching Dow's broad product offering."

24 Did that remain true when you were there?

25 A Yes.

1 Q Then going down to "Competitive Advantage." It's on the  
2 third paragraph under that same section.

3 MR. BERNICK: Third paragraph, same section.

4 Third paragraph. There you go.

5 (Mr. Bernick confers with the tech off the record.)

6 Q It says: "The competitive advantage of our integrated PO  
7 position..."

8 What's the integrated PO position?

9 A It means that you have your manufacturing plants connected  
10 to each other through, you know, like pipeline relationships.  
11 They're not separated physically, they're connected closely.  
12 And the reason you want to do that is to improve your cost  
13 position so you don't have separate facilities or separate  
14 buildings and you can do everything together on an integrated  
15 basis for cost -- cost reasons, but also for good environmental  
16 health and safety practices to have a smaller footprint so you  
17 can better manage environmental issues or health and safety  
18 issues.

19 Q Is there competitive significance -- tell us whether or not  
20 there's competitive significance to that integrated position.

21 A Yes, it's very significant, competitive advantage to be  
22 very grated. That was one of the great strengths of BASF,  
23 really another great strength of Bayer and also Dow. We all  
24 believe in this integration in order to be more competitive  
25 with our cost position.

1 Q This says, "The competitive advantage of our integrated PO  
2 position that Dow has historically enjoyed is declining, with  
3 the advent of POSM technology by Shell and the licensing of  
4 both Repsol and SKOC (without expansion limitations) by  
5 Lyondell (ARCO). The proliferation of PO sources beyond the  
6 traditional duopoly" -- that's two. Right?

7 A Two, right.

8 Q Two companies, "...of Lyondell (ARCO) and Dow has allowed  
9 BASF and Bayer to acquire producer economics via alliances  
10 and/or acquisition of PO producers. This tactic of alliances  
11 is one that we will mimic in Isocyanates to improve our  
12 competitive position."

13 Competitive position; as against whom?

14 A Against BASF and Bayer and ICI.

15 Q Again, do these remain active issues and dynamics when you  
16 came on board at the beginning of '04?

17 A Absolutely.

18 Q Now, I want to show you, talking about the condition of the  
19 business, I want to show you DX-8693, which has been proffered  
20 and is in evidence, to you. I'm just going to go through a few  
21 slides.

22 MR. BERNICK: If we can blow that up a little bit so  
23 it stands out a little bit more just to read it.

24 Q And you're going to need to explain a little bit.

25 Are you familiar with this kind of chart, Mr. Dawson?

1 A Yes.

2 Q Okay. It says down below if you look at the bottom, at the  
3 bottom left corner, it says: Trade --

4 MR. BERNICK: Would you blow that up a little bit,  
5 please. It's the color coding right above that.

6 (Mr. Bernick confers with the tech off the record.)

7 Q Could you just briefly explain to the jury what these terms  
8 mean?

9 A Sure. These are all measurements of how much money you're  
10 making at different levels of the business. The Trade Standard  
11 Margin is based on your trade sales and how much it costs you  
12 to make that product. And when you make product you have a  
13 variable cost. Cost varies. Like raw materials can move up  
14 and down as raw materials move up and down. That variable cost  
15 will move up and down. And then you have fixed costs in which  
16 in these businesses are very high.

17 Here fixed costs are labor, the people who are making  
18 that product there everyday. And so it's simply the Trade  
19 Standard Margin is the difference between what you're selling  
20 that product at and those standard costs being variable and  
21 fixed costs.

22 Your Gross Margin then is also what -- the price that  
23 you're selling at, but then not only do you subtract your  
24 standard -- your standard cost, you also subtract out any  
25 variances that you had, like if the plant had a maintenance

1       turnaround, you had to maintain the plant. You add those  
2       maintenance costs in to get to a Gross Margin Cost.

3               Then the Contribution Margin is really the amount of  
4       money you're making based on your selling price and what it  
5       costs you then to get your product to your customer. So that's  
6       your freight, your distribution cost, warehousing cost. And  
7       that's again a good measurement of how much money you're making  
8       at a customer level.

9               And in your EBIT is your earnings before you pay your  
10      income taxes. So after you pay for your freight and logistics  
11      cost, then you have to pay for your sales, people out selling  
12      the product, people who do the research and development on the  
13      product, you have to pay for any legal or HR support for your  
14      business to get that at earnings before income tax.

15              And once you get to your earnings before income tax,  
16      then you've got to pay your taxes, right? And once you pay  
17      those taxes you get to a net operating profit after tax. But  
18      then the difference between EBIT and economic profit is you've  
19      got to spend cash and money on these big plants in the form of  
20      capital to -- you know, it's just like your car. You know, the  
21      car has a problem, you've got to fix it, you need a new  
22      radiator or whatever you have to go spend some capital money on  
23      that new radiator.

24              So the economic profit really then reflects the amount  
25      of capital or cash you've got to put in these plants. It also

1 reflects your inventories, because once you make product, you  
2 put it inventory, it costs you money to carry those  
3 inventories, right? That's not free.

4 And eventually once you take all that capital or cash  
5 from your earnings before income tax, you're left with Economic  
6 Profit. And that economic profit is really the true measure  
7 and value of that business to your company.

8 Q Now, the different things that you've given us, are  
9 these -- are these kind of, you know -- what relationship, if  
10 any, do they have to how Dow looks at its own profitability  
11 internally?

12 A This would be my "scorecard" that I get held accountable  
13 for in running the business like this. These are my  
14 statistics, equivalent to your batting average, you're on-base  
15 percentage. This is how I got graded was by these types of  
16 measurements. It's very common in Dow Chemical.

17 Q Does Dow -- did Dow during this period of time regularly  
18 keep track of the performance of its businesses and gather and  
19 do these calculations for purposes of its ongoing business?

20 A Of course.

21 Q Okay. Going back to the big chart, does the big chart show  
22 with respect to MDI, going back from 1995 all the way forward  
23 through 2007, does it show the performance of, in dollars and  
24 cents, in terms of margin per pound, dollar per pound sold  
25 reflected in Dow's financials?



1 A Right. That's what it's reflecting.

2 Q So if we go to the very top line, is that the trade  
3 standard margin?

4 A Yes.

5 Q And if we see in 1995 it's a little bit of a -- \$.33 a  
6 pound. Would that then be the difference, the margin between  
7 trade revenue and your variable costs of production for that  
8 pound at that time? That's roughly \$.33 out of every pound was  
9 your margin?

10 A Yeah.

11 MR. SCHAEFER: Objection. Leading.

12 MR. BERNICK: I'm just trying get to it.

13 THE COURT: I'll allow it at this point.

14 MR. BERNICK: All right.

15 THE COURT: go ahead.

16 A So, yes, that trade standard margin reflects the selling  
17 price that we sell to a customer, and then taking out the  
18 variable cost of those raw materials along with some fixed  
19 costs of the labor that it takes to make that product. That's  
20 what the trade standard margin represents.

21 Q Okay. And I can go get my little pointer here.

22 We can follow that over time.

23 And so you start out in 1995 around \$.33. And if you  
24 go all the way through, you end up in 2007 at less than \$.30?

25 A Correct.

1 Q What's your observation about how good that is?

2 A Well, it's -- fundamentally it's -- it's not improving to  
3 getting a little bit worse on your trade standard margin.

4 Q If you go down and include more and more costs, so if you  
5 do gross margin by 2004 when you came on board, what was the  
6 gross margin?

7 A The gross margin was negative as you can see. So it means  
8 that you're losing money on a gross margin basis. Once you  
9 make your profit and you have some problems or issues with your  
10 plant that causes you to add additional cost, that gross margin  
11 is now in the red, as we would say, it's gone negative.

12 Q You see it goes down and makes a sharp turn in 2006, where  
13 we can also see from Dr. Raiff's chart that the actual prices  
14 take a big spike in 2006. We'll talk about that in a minute.  
15 Right?

16 A Yes.

17 Q Let's go to the next slide because I think this will then  
18 move pretty quickly.

19 If you take a look at TDI, again at the top line,  
20 1995, the margin here, trade margin is only about -- it looks  
21 like actually it's about maybe close to 30 -- the scale is a  
22 little different -- and that then dips down and comes up.

23 As of what point in time did the other margins turn  
24 negative?

25 A The other margins turned negative -- well, the economic

1 profit turned negative in about 1996, 1997. And as you can  
2 see, the margins continued to go down and hit an all time low  
3 in 2001. And then you started to see, you know, a pretty flat  
4 period of time where you're very low depressed margins. And I  
5 also recall, you know, at that point in time that was the  
6 lowest pricing in 20 years of TDI.

7 Q Am I here?

8 A Yes.

9 Q And by the time you came on board in 2004, on all of these  
10 different measures except the top one, TDI had been negative  
11 for I guess it's about six years?

12 A That's right.

13 Q And you were going to go turn that around. Right?

14 A That was my job.

15 Q Okay. Polyols. Here again the scale has changed a little  
16 bit in order to capture some of the high points. Polyols look  
17 a little bit better. It stayed positive for most of the  
18 measures -- remained positive at all points. Once you include  
19 the cost of the plants -- am I right to say it became negative  
20 in '01, and actually snapped back -- did you take credit for  
21 popping above zero when you joined?

22 A Of course.

23 MR. SCHAEFER: Objection. Just that Mr. Bernick is  
24 pretty much testifying.

25 THE COURT: All right.

1 Q So is that an accurate characterization of economic profit;  
2 that is, in the case of polyols, economic profit was the only  
3 one that -- I think that's that cost of the plants again?

4 A Yeah, that's right. And as you spend more money on the  
5 plants, more cash on your plants to make them more reliable,  
6 that could be one of the reasons why your economic profit goes  
7 down.

8 Q Let me ask you a question: When you came on board in 2004,  
9 at that point in time who was the CEO of the company?

10 A The CEO at that time was Bill Stavraopulos, and Andrew  
11 Liveris had been named the COO of Dow Chemical.

12 Q And did he ultimately become the CEO?

13 A That's correct, CEO and Chairman.

14 Q And is that still true today?

15 A Yes, it is.

16 Q Okay. Now, at that point in time, could you -- could you  
17 tell the jury whether consideration was given to actually just  
18 getting out of the business altogether?

19 A Yeah. When you see these kind of results you can't just  
20 continue to let things bleed that way. So all options were on  
21 the table, the options of either try to sell the business, shut  
22 down assets that weren't profitable, but to do whatever it took  
23 to improve the profitability of the business. It was not a  
24 sustainable business with these kind of results and so we were  
25 considering all possibilities to improve profitability.

1 Q Okay. Including?

2 A Selling or shutting down assets.

3 Q Okay. I want to turn now and go forward from 2004, and  
4 we'll do TDI on this one and maybe if we have time we'll fill  
5 out the others, but I'm concerned about time. I know you have  
6 your own time pressures too and we all want to push forward to  
7 conclusion here.

8 I want you to talk about the changes that took place,  
9 if any, in the market, the supply and demand factors, the  
10 business, anything you want to talk about that relates to  
11 prices in TDI from the time that that you came on board going  
12 forward.

13 A So, there's several points to be made about, there was what  
14 I call a tipping point or an inflection point that some of the  
15 fundamentals were starting to change. One of the big changes  
16 at that point in time was in 2004 you had continuing increases  
17 in raw material cost that went into making TDI. So oil was  
18 going up tremendously at that time along with the cost of our  
19 products. So that continued on. But what happened in that  
20 period is that profitability got so bad that a lot of producers  
21 were talking about shutting down assets to their customers.

22 And in August of 2005, there was a Hurricane Katrina  
23 that hit the Texas/Louisiana area, and it hit Lyondell's plant,  
24 which at that time Lyondell was making a lot of TDI, and then  
25 in September of that same year, Hurricane Rita came in and hit

1 a similar area of Texas/Louisiana. And at that point in time  
2 Lyondell decided to shut down about 300 million pounds of their  
3 capacity because that plant, we speculated in the press, wasn't  
4 making money and their CEO came out with a statement that said:  
5 We're not going to restart that plant up again.

6 And that took out a lot of capacity that was excess  
7 product out in the market. It took it out overnight when that  
8 second hurricane hit. And that's why you see prices go up so  
9 dramatically.

10 And then there's a little period of time in there  
11 where -- where prices remain high, but then they take another  
12 step up in about 2006. And that --

13 Q Hold up. If I can interrupt. Okay?

14 I want to talk about this, what you just referred to,  
15 and then we'll talk about 2000 -- what happened later on.

16 A Okay.

17 Q We'll do it piece-by-piece.

18 You told us about Katrina and Rita and Lyondell  
19 going -- not going out -- not restarting.

20 A Correct.

21 Q And as it was reported at the time, as you understood it,  
22 why was Lyondell just not -- was just going to exit? Do you  
23 know? As you understood it.

24 A As was reported by their CEO to investors, it was not  
25 making money and it was the worst product that Lyondell had in

1 their whole company, according to their CEO.

2 Q I want to show you Defense Exhibit 872.

3 MR. BERNICK: It's pre-admitted.

4 Just show the first page, 872, defense -- I'm sorry.  
5 972. My mistake.

6 If you could blow up the top part down to -- just blow  
7 up the top email. Actually just get from the John Wilson from  
8 the "From," down to the "Re," the subject right there.

9 (Bernick confers with the tech off the record.)

10 Q Does this reflect -- let me just ask --

11 MR. BERNICK: This is pre-admitted. Do you have any  
12 objection?

13 MR. SCHAEFER: No objection.

14 MR. BERNICK: If you just blow that up.

15 Q Is this a report on October of 2005: "Lyondell takes  
16 hurricane-related --

17 MR. BERNICK: You have to go back.

18 Q -- hurricane related charges: Ceases TDI production."

19 A Correct.

20 Q Okay. Okay. I want to also then go back to Defense  
21 Exhibit 8623 and show that.

22 MR. BERNICK: That's in evidence.

23 Q This reflects U.S. Industry TDI production, industry  
24 capacity. And we see here -- why don't you just tell us what  
25 this shows and why it changed.

1 A So, this is again the amount of product that's being made,  
2 TDI. TDI fundamentally is one product. And it shows how there  
3 was a lot of capacity that got added really starting in about  
4 1997, and that capacity, the industry was building a lot of  
5 capacity, you know, increasing it dramatically as you can see  
6 up until 2001. And then you see capacity start to come down a  
7 little bit, and then you see this tremendous drop in 2005  
8 that's associated with the hurricanes that I just spoke about.

9 Q Now, what if anything was the impact of this loss of --  
10 first of all, what about Huntsman, ICI, what did they do?

11 A ICI had a TDI facility on the U.S. Gulf Coast, I believe it  
12 was in Louisiana, that they sold to BASF. And when BASF bought  
13 that facility, they shut it down.

14 So that was more capacity that came out of the market  
15 at that point in time, in addition to the hurricanes taking out  
16 the Lyondell capacity.

17 Q Now, when you -- just tell the jury -- I think they've  
18 heard it before, but tell us what happens -- what, if any, is  
19 the relationship between taking all of this capacity out and  
20 what happened to prices for TDI?

21 A Fundamentally you go from a buyer's market, buyers have the  
22 power, right, because there's so much product out there, so  
23 this really was the tipping point that made it a seller's  
24 market. So the sellers of TDI really had more the power at  
25 that point in time when all that capacity left the marketplace.



1 Q This is so precipitous. I mean, is it literally the case  
2 that, you know, the prices rose that quickly?

3 A Yes, absolutely. They rose that quickly because of how  
4 much money had been lost going back to, again, the point about  
5 understanding the history. And I think, quite frankly, it just  
6 wasn't sustainable.

7 And this is not uncommon in a commodity type product  
8 like TDI for this -- something like this to occur, for pricing  
9 to go up that dramatically when, like I say, you go from a  
10 buyer's market to now a seller's market.

11 Q So Lyondell is out, they make that decision. Bayer buys --  
12 or BASF buys ICI. They shut it down. The buyers -- what  
13 you're saying -- I think what you're saying -- you tell me --  
14 is that these were decisions that related to the sustainability  
15 of the business at the old price. Is that --

16 A That's correct.

17 MR. SCHAEFER: Just so the record is clear, the chart  
18 says "ICI." I think you mean Huntsman. Yes?

19 THE WITNESS: Huntsman bought ICI's business, so  
20 Huntsman --

21 MR. SCHAEFER: They weren't ICI in 2005, 2006.

22 MR. BERNICK: Okay, that's fine. Huntsman. Huntsman  
23 ICI, whatever it is. But I'll just correct that.

24 Thank you.

25 Q Just explain that briefly again. What does the -- what

1 does the exit of these companies say about the sustainability  
2 of the old prices?

3 A It says, first of all, that those prices were not  
4 sustainable based on the overcapacity in the industry and the  
5 lack of growth. Shutting those assets down also was an  
6 admission that those assets were not competitive going forward.

7 Q Wake-up call to the customers?

8 A A big wake-up call.

9 Q I want to go more quickly now to MDI.

10 Polymeric MDI. Again, I want to go to the same period  
11 of time, which was the period of time that you're there. And  
12 could you just give us -- well, maybe this will expedite it a  
13 little bit. I want to show you Defense Exhibit 5670. And I'll  
14 tell you what; I'll just hand you my copy. It's not  
15 pre-admitted.

16 MR. BERNICK: Don't show it yet.

17 Q Are you familiar with this document, Mr. Dawson?

18 A I'm just looking at it here.

19 Yes, I am familiar with it.

20 Q Is this a document that you had the opportunity to look at  
21 in preparation for your coming here today?

22 A Yes.

23 Q Did you have anything to do with the preparation of that  
24 document?

25 A This document was prepared -- I'm looking for the date --

1 Q I think it's down at the bottom left.

2 A Yes, I'm very familiar with it.

3 Q Okay. Was this something that was prepared in the ordinary  
4 course of Dow's business at or about the time it's dated?

5 A Yes.

6 MR. BERNICK: We offer it.

7 THE COURT: Okay.

8 MR. SCHAEFER: Just one objection. There's some  
9 handwriting in a couple of places. I don't know if that's  
10 going to be the subject of examination or not, but --

11 MR. BERNICK: If you give me the Bates number maybe we  
12 can solve that right now.

13 THE COURT: Yeah, go ahead.

14 MR. SCHAEFER: There's some on page 004, also on 007.

15 BY MR. BERNICK:

16 Q Do you see the handwriting there?

17 A Yes, that's my handwriting.

18 Q Okay.

19 MR. SCHAEFER: Okay. With that, no objection.

20 THE COURT: All right. It will be in evidence.

21 Q I want you to turn -- you can hand that back to me. Thank  
22 you.

23 MR. BERNICK: If we could show page 014.

24 If you could blow that up. Even more. Just -- well,  
25 actually that's pretty good right there.

1 Q This says "Historic and Forecast pMDI Operating Rates."

2 Does that relate to polymeric, that is, pMDI?

3 A Yes.

4 Q What does that chart show?

5 A What this chart is showing is how much money on a  
6 cent-per-pound basis you make over your raw material cost which  
7 is referred to as the feed stock cost.

8 Q Could you speak a little bit more into the microphone.

9 A Yes.

10 So this is the margin that you make when you sell the  
11 product and the difference between what your selling price is  
12 and your feed stock cost, which is really your raw materials,  
13 like propylene or benzene, for example. So that's the  
14 difference. That's what it's showing; the margin over your  
15 feed stock or raw material cost.

16 Q Okay. And if we take a look here, what does this -- what  
17 does this -- there's a gap between the operating rate and the  
18 margin. Margin falls in 1998, 1999, 2000, and then it slowly  
19 comes up, and then it pops here with 2005.

20 What does this chart show about pMDI?

21 A What it shows you is really in the bullet points that I had  
22 made down at the bottom, and that is too much capacity of this  
23 product got built in the last peak; the peak being the margin  
24 back in 1995 time frame. So people, including Dow, looked at  
25 this and said, wow, we can make a lot of money on this based on

1 the results. And we built more capacity.

2 And when --

3 Q Wait. "Built more capacity. You mentioned that peak in  
4 '95.

5 A Yeah.

6 Q We've kind of drawn a little line here.

7 When was -- when was capacity built as you understood  
8 it, what you were referring to here, and why?

9 MR. SCHAEFER: Objection. Foundation, lack of  
10 personal knowledge.

11 THE COURT: Where year are we going back to?

12 MR. BERNICK: We're going back to '95. What he's  
13 talking about here, he wrote the chart, this is his chart. I'm  
14 just asking him --

15 THE WITNESS: Yeah.

16 MR. BERNICK: -- to interpret the chart.

17 THE COURT: Go ahead, I'll allow it.

18 MR. BERNICK: Yeah.

19 A Yeah. So again, you know, looking -- when I looked at  
20 this, you had some very attractive margins that --

21 Q When?

22 A -- that justified --

23 Q When?

24 A -- the fact you could reinvest. And so those margins that  
25 we were looking at back in the '92, '93 time frame because it

1 takes you, you know, several years to build a plant and to  
2 bring on new capacity. So the margins were attractive enough  
3 those prior years to say, you know, there should be more  
4 capacity being built. And that's what happened.

5 And the problem was that by the time you build this  
6 capacity and you bring on, you know, 300 to 350,000 tons,  
7 that's a lot of capacity, right? And about the time that  
8 capacity was being brought on the demand for product started  
9 declining in those years afterwards, in that '96, '97, '98 time  
10 frame.

11 And so here you bring on too much capacity of product,  
12 the demand goes down and you're left with lower operating  
13 rates, and these lower operating rates are against a plant that  
14 cost, you know, five, \$600 million to build. So you have a lot  
15 of cash invested in this thing. It's not running at the rates  
16 that it was planned to run at and it's not a good situation.  
17 And then that's where, you know, the buyers -- it's a buyer's  
18 market in those years prior to that, that's why margins were  
19 going down and hit a bottom in about 2000, 2001.

20 Q What about costs? Are rising costs a factor?

21 A It's a major factor. Raw material costs are over 50  
22 percent -- well over 50 percent of your cost structure. So you  
23 also had rising raw material cost in that late '90s time frame  
24 that exacerbated the margin. If you can't raise your prices --  
25 if you can't rise your prices to offset those higher raw

1 material costs, then that's why you make less margin which is  
2 represented in those black bar charts.

3 Q I forgot one thing and I want to pick something up.

4 I think you told us that there was something else that  
5 happened with respect to TDI after the people get out of the  
6 business in the hurricanes. You said something else happened  
7 in here.

8 A Yeah.

9 Q What else happened in there?

10 A Yeah. On this TDI chart, the reason that it -- it went  
11 flat sideways there for about eight or nine months was, you  
12 know, that capacity had been taken out. But the reason you see  
13 that second peak going up is I made a decision to shut down the  
14 TDI plant in Porto Maghera, Italy because it was a plant that  
15 Dow had bought from EniChem. It wasn't a competitive plant,  
16 and I shut that down in August of '06. And that was more  
17 capacity that came out of the TDI industry, and that was  
18 another shock to buyers that price was going to go up even  
19 higher. And that's what's reflected on the chart and that was  
20 the reason why prices went up on that second spike in '06.

21 Q What was the problem with that plant? Was there a problem?

22 A It wasn't competitive.

23 Q It what?

24 A It wasn't competitive from a cost standpoint, and we felt  
25 that it had some risk associated with environmental health and

1 safety issues that we didn't want to take that risk in the  
2 future.

3 Q Did you tell the board of directors about those risks in  
4 connection with the decision?

5 A Yes. I reviewed that with the board and the CEO who was  
6 there, along with our CFO at the time.

7 Q Okay. Before we get back to this chart, and I don't know  
8 if we can show --

9 MR. BERNICK: Can we show Pauley Exhibit 18, whatever  
10 that is, on the left?

11 MR. SCHAEFER: We're going to object to the use of  
12 this exhibit with the witness from the Pauley deposition.

13 MR. BERNICK: I'm just going to use it for  
14 demonstrative purposes really, and that's to talk about this  
15 and to talk about that and to see whether this witness'  
16 testimony is consistent with Mr. Pauley's testimony, just  
17 different.

18 THE COURT: Let me hear the question. Go ahead.

19 BY MR. BERNICK:

20 Q I want to close out TDI here.

21 Based upon your experience in the industry and your  
22 analysis of industry history on TDI, we can see that Mr. Pauley  
23 has written, the jury just saw it: "Less capacity over the  
24 price spike in '06, TDI, and more capacity over the lower  
25 prices earlier on."



1           And my question is whether that's consistent or  
2           inconsistent with your own experience and understanding of the  
3           industry?

4           THE COURT: I know you have an objection. Right?

5           MR. SCHAEFER: Yeah. I just object that it's not  
6           necessary to use this other exhibit which is essentially a copy  
7           of the one that he's using here.

8           THE COURT: I'll allow this question.

9           Go ahead.

10          MR. BERNICK: Thank you.

11          A    It's very consistent.

12          Q    Okay.

13               Now, before we go back to -- and I want to take this  
14               one down.

15          MR. BERNICK: If you could put the other one back up  
16               that we just had on MDI.

17          Q    Okay. Before we go back to MDI on this chart, if you take  
18               a look down here we can see that the actual prices -- I should  
19               say, the actual as opposed to proposed prices, but the industry  
20               weighted prices under Dr. Raiff's curve for -- industry median  
21               prices under Dr. Raiff's curve for TDI. We can see that  
22               they're kind of flat here and they kind of make a right turn.

23               If we go to this chart here for MDI, it's flat, but  
24               then it kind of curves, and before '05 it starts to go up.

25               Why is there this difference between the MDI pricing

1 during this period of time and the TDI pricing, if you know?

2 A First of all, it's different applications. The MDI goes  
3 into different applications. It goes into, like,  
4 refrigerators, hot water heaters, insulation. You know, when  
5 you do spray foam insulation like insulating your homes, that's  
6 a polymeric MDI that's used in conjunction with a polyol.  
7 Whereas, the TDI is used in, like, your mattresses, you know,  
8 furniture, bedding type applications. So it's different  
9 applications and it has different growth fundamentals  
10 associated with it.

11 So what you're -- I'll just stop there. That --

12 Q Okay. But why is this curve starting to recover a little  
13 bit ahead of TDI which doesn't start to move until a little bit  
14 later, and then very sharply?

15 A Yes, it's a little different than TDI because what happened  
16 is the industry did overbuild capacity on MDI, as we talked  
17 about on this chart behind you, and what was happening is MDI  
18 has much better growth than the TDI applications. So what you  
19 see happening is there was no additional capacity added for  
20 many years in MDI, and demand was growing at well above 7  
21 percent. A few of those years in that '7 -- '6, '7, '8 time  
22 frame it's growing over 10 percent.

23 So the growth fundamentals were helping improve the  
24 capacity utilization of the industry plants, and that's why you  
25 see MDI prices rising, is because the supply and demand came

1 into better balance because people had not added capacity for a  
2 long time, and you had the momentum of price increases being  
3 driven by higher raw material costs at that time as well.

4 Q Okay. Let's get out of "Dodge."

5 Polyols. What changed on polyols, if anything, when  
6 you were there when you -- after you came on board?

7 A The change in polyols may not be so clear to someone who  
8 doesn't know this industry or this market for polyol.

9 A big part of how you make polyols is you use  
10 propylene oxide. Propylene oxide is like 60, 70 percent of  
11 making a polyol. And what happened -- and it was more gradual  
12 as you can see -- but there was an inflection point in that '04  
13 time frame from where it had been previously. That inflection  
14 point is the fact that propylene oxide started to get very  
15 tight. Operating rates went from the high 70s, to the low 80  
16 percent operating rates at the plants. Those operating rates  
17 went above 90 percent.

18 And when operating rates go above 90 percent in a  
19 product like propylene oxide, it becomes tight. So people who  
20 were making polyols that weren't integrated into propylene  
21 oxide like Dow was, they had problems getting PO. And so they  
22 couldn't get enough propylene oxide because it had become  
23 tight, and they couldn't make as many polyols, and that  
24 tightness of PO caused the polyol price to go up along with  
25 good demand for those polyols in that ridged MDI market. So

1 that PO operating rate was a big factor of driving polyol  
2 prices up during this time frame. And that was a unique  
3 circumstance.

4 And the last thing I want to say about this pricing of  
5 polyols is, what had changed in the -- when we talked to  
6 customers, is customers could see a lot of prices going up.  
7 They saw TDI going up, they saw MDI going up, they saw a lot of  
8 other raw materials going up, and polyols. So the psychology  
9 of the buyer changed because they saw a lot of things really  
10 increasing during that time, and that's the other point that  
11 helps support these increases for polyols.

12 THE COURT: Go ahead, Mr. Bernick, another question.

13 MR. SCHAEFER: Just an objection to the last piece of  
14 that when the witness talked about the psychology of the buyers  
15 changing. I think that's --

16 THE COURT: I'll allow it. Go ahead.

17 BY MR. BERNICK:

18 Q I now want to take a step and talk more generally, about --

19 THE COURT: Let's recess. Let's take a few-minute  
20 recess then, this is a good time.

21 Ladies and gentlemen, we'll take a 15-minute break  
22 that. Okay? We'll see you. No discussion about the case,  
23 please.

24 (The Jury leaves the courtroom.)

25 THE COURT: Counsel, 1:15. Okay?

1 MR. BERNICK: Sure.

2 THE COURT: All right?

3 MR. BERNICK: Yes.

4 (Witness temporarily excused.)

5 THE COURT: Just give me an idea, how many more  
6 witnesses do you expect?

7 You can be seated, please.

8 MR. BERNICK: How many more witnesses?

9 THE COURT: Yeah, just --

10 MR. BERNICK: Live witnesses or video?

11 THE COURT: Either way.

12 MR. BERNICK: I think Jon probably has a better sense  
13 of that.

14 MR. STREETER: Yes, your Honor.

15 So, live witnesses, I think there are five of them  
16 left. And then in terms of video witnesses, we don't have any  
17 long ones, they're all a couple, two hours and a lot of half  
18 hour ones. I think it's probably somewhere in the neighborhood  
19 of 15 of them, but they're short.

20 THE COURT: You're keeping track of --

21 MR. BERNICK: We are.

22 The live witnesses also, we have Mr. Beitel. I don't  
23 think he'll be too long, but we have a series of live witnesses  
24 who will be relatively short, they relate to Ms. Barbour so  
25 they'll be short, and we have Dr. Ugone.

1 THE COURT: I'm just trying get idea.

2 Okay. We'll see you in about 15 minutes. Thanks.

3 (A recess is taken.)

4 (Proceedings resume - Jury not present.)

5 THE DEPUTY CLERK: Remain seated.

6 Please rise for the Jury.

7 (Jury present.)

8 THE COURT: Okay, everyone, be seated. Thank you.

9 Mr. Bernick, you can continue.

10 MR. BERNICK: Thank you, your Honor.

11 DIRECT EXAMINATION CONTINUES

12 BY MR. BERNICK:

13 Q Mr. Dawson, if you could take a look at Defense Exhibit.

14 DX-4836. Are you familiar with that document?

15 A Yes.

16 Q Is that a presentation that was put together by Bob Wood --

17 A Yes.

18 Q -- in 2001?

19 Was it generated in the ordinary course of business at

20 Dow?

21 A Yes.

22 Q Is it the kind of document that was relied upon Dow in its  
23 ordinary course of business to do business planning?

24 A Very standard, yes.

25 Q And are you familiar with this document? Have you reviewed

1 it?

2 A Yes.

3 Q Does this reflect facts if are part of the historical  
4 background that you would look at when you came on board in  
5 2004?

6 A Yes.

7 MR. BERNICK: We offer it, your Honor.

8 THE COURT: All right. It's in evidence.

9 MR. SCHAEFER: I still object on the basis of  
10 foundation. But otherwise --

11 THE COURT: It's in evidence then. I understand your  
12 objection.

13 MR. BERNICK: Thank you.

14 Q So I want to get to a concept cyclicalilty.

15 Does that document, does that report reflect some  
16 graphs regarding cyclicalilty?

17 A Yes, it does.

18 Q In order to make this a little bit simple, if we can just  
19 show up on the screen two things. One is page 5 of DX-1170,  
20 and the other is page 1 of DX-8693.

21 And is it fair to say that both of these relate to  
22 MDI?

23 A Yes.

24 Q And it actually talks about the last cycle?

25 A Yes.

1 Q And we have a period '92, '93 which is negative, but then  
2 rising, it comes up, it goes back down, it has capacity is  
3 added. And I think this chart ends up with -- the document  
4 ends in about 2001?

5 A Right.

6 Q And then the if we go to the summary of financial  
7 performance -- this is a summary of financial performance  
8 itself. Is that right?

9 A That's right.

10 Q And it actually talks about net 54 million of EP. What is  
11 "EP"?

12 A That's economic profit.

13 Q The same kind of thing that's down here?

14 A Yes.

15 Q Okay. So then the other chart kind of picks up in mid  
16 1990s, kind of corresponding here, mid 1990s, mid 1990s, but  
17 then it goes out further and picks up this dip.

18 Just putting those two things together, these two  
19 charts together, do they reflect essentially a business cycle  
20 for MDI?

21 A Yes.

22 Q Okay. If we look up on this chart here for polymeric MDI  
23 we can see the same kind of bump. This is not in economic  
24 profit, this is in weighted mean industry prices per Dr. Raiff.

25 But do we see kind of the same image where it goes up,



1 it comes down for a long time, and then towards the very end  
2 MDI starts to go back up again?

3 A Correct.

4 Q Would we see the same kind of cyclicalality also for TDI? It  
5 goes up, same kind of thing. It comes down, TDI really takes a  
6 dip during the market recession, flat, and then it rises very  
7 quickly with the change in the production capacity.

8 A Right.

9 MR. SCHAEFER: Objection, just to the extent that  
10 what's on the screen is a different time period, different  
11 product than --

12 MR. BERNICK: I'll be clear.

13 THE COURT: It's a different product, isn't it?

14 MR. BERNICK: Yes. I went through MDI. This is the  
15 same one. So we did that. This chart now I think I said, and  
16 even with respect to other products, I thought my question was:  
17 Do we see the same kind of cycle?

18 We can take this down if helps.

19 Does that help?

20 THE COURT: All right. I'll allow that. Go ahead.

21 BY MR. BERNICK:

22 Q Do we see also cyclicalality when it comes to TDI?

23 A Yes.

24 Q Although we've got this big dip down here, and then it  
25 comes up like that that?

1 A Yes.

2 Q But TDI had this -- these two major events that really made  
3 it sharp?

4 A Yes.

5 Q And if we go to polyols, do we then see it comes up, it  
6 comes down, not quite as sharp a thing, and then it comes up  
7 again?

8 A Right.

9 Q A few more questions and we're done.

10 If we take the period of time before 2004 -- and as  
11 you know, the alleged conspiracy period here is '94 through  
12 2004 --

13 MR. JOHNSON: '3.

14 MR. BERNICK: Yes, thank you. That has significance  
15 we won't go into.

16 Q So up through the end of 2003, and then the period of time  
17 afterwards. So this is the dividing line. I want to ask you  
18 this question and I'll ask you the same question with respect  
19 to all of these charts, and it's the same kind of question I  
20 asked Mr. Pauley.

21 MR. BERNICK: We could play Mr. Pauley's testimony  
22 that I've asked to be replayed?

23 MR. SCHAEFER: You're going to play the video?

24 MR. BERNICK: Yeah, just a clip, a very small clip of  
25 it where we deal with exactly the same point.

1 THE COURT: Yeah, we don't need that.

2 MR. BERNICK: Well, I'd like to ask him -- we can read  
3 the testimony if that would be better.

4 THE COURT: Well, what are you going to ask him?

5 MR. BERNICK: I'm going to ask him whether or not he  
6 has the same view as Mr. Pauley. Mr. Pauley testified exactly  
7 on this subject.

8 MR. SCHAEFER: There's no reason to play the video.

9 THE COURT: Yeah, we don't need to have one witness  
10 attributing to another witness what the other witness said.  
11 Whether it was accurate or not, that's for the jury to  
12 determine, that's all.

13 MR. BERNICK: I'm asking a different question. I'll  
14 put it differently.

15 BY MR. BERNICK:

16 Q I want you to assume -- I just want --

17 MR. BERNICK: I don't want to play it. I want to ask  
18 him whether he agrees or disagrees with a plaintiff in the  
19 case, Mr. Pauley.

20 THE COURT: Well, ask the question. You don't need to  
21 play the video.

22 MR. BERNICK: Okay. I'll just do it this way.

23 (Mr. Bernick confers with co-counsel off the record.)

24 MR. BERNICK: Can I show the transcript anyhow?

25 THE COURT: What's that?

1 MR. BERNICK: Okay. Thank you.

2 You know what, your Honor, I think I can save time.

3 BY MR. BERNICK:

4 Q I want to show you DX-6790. Are you familiar with DX-6790?

5 A Is this it right here?

6 Q I'm sorry, I should have given it to you. I thought he was  
7 putting that up (handing document).

8 A Yes, I am familiar with that.

9 Q And could you just identify it for the Court?

10 Go ahead and tell Court -- tell the jury and the Court  
11 what it is.

12 A Basically this is an industry interview on what was going  
13 on with price increases, capacity, utilization, and there's  
14 quotes from myself, there's quotes from Lyondell, there's  
15 quotes from BASF about the industry and what's going on with  
16 pricing and the fundamentals.

17 Q Okay. And the quote from you, does it appear as -- in  
18 quotes?

19 A Yes.

20 Q And is that an accurate quote?

21 A Yes, it is.

22 MR. BERNICK: We'll offer it, your Honor.

23 THE COURT: All right.

24 MR. SCHAEFER: We object on the basis -- I mean,  
25 there's a single quote from Mr. Dawson but it's a trade

1 article. It has other hearsay, and it's --

2 THE COURT: Okay. Well, I don't know what this is.  
3 Could someone show it to me?

4 MR. BERNICK: Yes, I'm sorry.

5 THE COURT: I don't know what this is.

6 MR. BERNICK: I'll handle it up to the Court. It's  
7 Chemical Week.

8 MR. SCHAEFER: Subject to the same limiting  
9 instruction that your Honor gave yesterday --

10 THE COURT: Yeah, I know.

11 All right. This is not pre-admitted. Right?

12 MR. BERNICK: Correct.

13 THE COURT: All right. Just ask him if, in fact, on  
14 this date in this publication he was quoted as the following,  
15 that's all. This doesn't have to go into evidence.

16 MR. BERNICK: That's fine, your Honor.

17 BY MR. BERNICK:

18 Q In Chemical Week in October of 1995 -- 1995 -- 2005, were  
19 you quoted as saying, with regard to the market for  
20 polyurethanes the following: That, "There has been a  
21 fundamental change in the market. People are tired of losing  
22 money on these assets, and the run-up in feed stock prices have  
23 exacerbated the situation and pushed them over the edge"?

24 Did you say that?

25 A Yes, I did.

1 Q With regard to TDI, was it true that there was a  
2 fundamental change that, as you have indicated, was focused on  
3 the old prices and the need to change the old pricing  
4 situation?

5 A Yes.

6 Q Now, if we want to bottom-line the thing, I want to ask you  
7 about testimony from -- or a document that was used -- I  
8 probably dropped it, I'm sorry -- with Mr. Pauley.

9 MR. BERNICK: I'm now not going to be able to find it  
10 because I dropped it.

11 Here we are.

12 This is a demonstrative --

13 Could we pull this up?

14 (Mr. Bernick confers with the tech off the record.)

15 MR. BERNICK: The jury just saw -- I filled this out  
16 in the course of examining Mr. Pauley and the jury will recall  
17 what they recall concerning whether Mr. Pauley agreed with what  
18 I wrote.

19 But that it says: (Reading) 1997 to 2003: Different  
20 market for TDI versus post 1993 (sic). Different market versus  
21 pre-'97.

22 I want to focus not on pre-'97, just the  
23 pre/post-2003.

24 MR. SCHAEFER: I object to the form of the question,  
25 because what Mr. Bernick is referring to is a chart that he

1 wrote, and to the extent he's attributing this to any testimony  
2 of Mr. Pauley, that's inaccurate.

3 MR. BERNICK: The jury will recall -- I'm sorry, your  
4 Honor.

5 THE COURT: All right. I don't think you need to use  
6 this demonstrative, Mr. Bernick.

7 MR. BERNICK: Okay.

8 THE COURT: Let's -- okay. The objection is  
9 sustained.

10 BY MR. BERNICK:

11 Q QUESTION -- at line 7 of page 2013 to Mr. Pauley. The  
12 jury just saw this:

13 (Reading) So would you agree with me then that 1997  
14 through 2003 was also a different market from pre-1997?

15 The witness answers: Yes.

16 And I asked him to be clear: I'm sorry?

17 And he answered: Yes.

18 Would you agree with Mr. Pauley's statement that I  
19 just read to you, that the market pre and post 2003 was  
20 different?

21 MR. SCHAEFER: I object to the form.

22 THE COURT: You know, Mr. Bernick, these are  
23 argumentative. Asking him whether he agrees with another  
24 witness is getting argumentative. I'm not going to allow it.  
25 He can say it was different, Mr. Pauley could say it was

1 different. In summation you can do what you want with it, but  
2 this is getting repetitive and I'm not going to allow it.

3 MR. BERNICK: Okay.

4 THE COURT: So stop doing it.

5 MR. BERNICK: Okay, I will.

6 THE COURT: Okay.

7 BY MR. BERNICK:

8 Q So, Mr. Dawson, tell us whether or not the pre and post  
9 markets for polyols for before the beginning when you joined,  
10 and after, tell us whether or not they're different.

11 A Yes, they are different for the reasons I had commented on  
12 before.

13 Q The same thing, the same question with regard to TDI?

14 A Yes.

15 Q The same thing with regard to polymeric pMDI, are they the  
16 same or were they different?

17 A Different.

18 MR. BERNICK: I pass the witness, your Honor.

19 THE COURT: All right. Thank you.

20 Counsel.

21 MR. SCHAEFER: I'm just going to...

22 (Documents are handed to the witness by Mr. Schaefer.)

23 THE COURT: You can proceed. Go ahead.

24 MR. SCHAEFER: Good afternoon, lady and gentlemen of  
25 the jury.



1 CROSS-EXAMINATION

2 BY MR. SCHAEFER:

3 Q Good afternoon Mr. Dawson.

4 My name is Dan Schaefer. I'll be doing the  
5 cross-examination of today, possible recross if necessary.

6 Do you recall that you gave sworn testimony in a  
7 deposition in this case in March of 2010?

8 A Yes.

9 Q And do you also recall that you gave sworn testimony again  
10 in February of 2013?

11 A I'm not sure I recall '13.

12 Q In February of 2013, you gave sworn testimony in connection  
13 with this case.

14 A And where was that?

15 MR. BERNICK: Because you just showed him the  
16 transcripts --

17 Q You have the transcripts right in front of you there, Mr.  
18 Dawson, if you want to take a look and see if that will refresh  
19 your recollection.

20 My question is simply if you recall -- and this is yes  
21 or no -- that you gave sworn testimony in February of 2013?

22 A Okay. Yes.

23 Q And just to be clear, I may at certain times refer back to  
24 prior testimony that you gave, and to be clear, I may be  
25 referring back to testimony you gave in either March of 2010 or

1 in February of 2013. That's what I mean when I say "prior  
2 testimony," as opposed to something you said just now during  
3 your direct examination. Do you understand that?

4 A Yes.

5 Q You had no responsibilities for the urethane business prior  
6 to 2004, when you became the Vice-President in charge of Dow's  
7 Polyurethane business. Correct?

8 A That's correct.

9 Q And to be precise, you took over the business in January of  
10 2004. Right?

11 A Right.

12 Q And prior to 2004, you did not work with David Fischer.  
13 Correct?

14 A Correct.

15 Q And you testified during your direct exam that by the time  
16 you became involved in polyurethanes in 2004, or very shortly  
17 thereafter, within a couple of months I believe, that a number  
18 of employees in Polyurethanes, including David Fischer, Bob  
19 Wood, Marco Levi, Stephanie Barbour, Charles Churet and Rick  
20 Beitel -- and you didn't testify to all of those -- but all  
21 those folks were gone from the polyurethanes business in early  
22 2004 or shortly thereafter. Correct?

23 A That's not correct.

24 MR. SCHAEFER: Mr. Goldberg, let's pull up page 4782  
25 of the 2013 testimony, if you would, line 2.

1 Q The question is:

2 (Reading) By that point then when you assumed those  
3 new responsibilities with respect to polyurethanes, Mr. Levi,  
4 Mr. Beitel, and others were gone from the Polyurethanes group.  
5 Right?

6 Answer at line 6: Mr. Beitel was still around in a  
7 transitioning role.

8 QUESTION: But he didn't have his earlier  
9 responsibilities as the head of sales for polyurethanes.  
10 Right?

11 ANSWER: There was a few months where he was  
12 transitioning with Bob Elliot, and then it continues.

13 Was that the testimony that you gave --

14 A Yes.

15 Q -- previously?

16 A Yes.

17 MR. BERNICK: Your Honor, that's not impeachment, it's  
18 consistent with -- he said it wasn't true with respect to the  
19 answer to the first question.

20 THE COURT: That's correct.

21 Counsel, go ahead.

22 Q Okay. Granting that Mr. Beitel was around for a couple of  
23 months transitioning, other than that, all those employees were  
24 gone from Polyurethanes in early 2004. Correct?

25 A Yes.

1 Q Mr. Beitel was terminated and replaced as the Commercial  
2 Director. Right?

3 A I don't recall he was terminated. He was -- there was a  
4 transition with Bob Elliot.

5 Q He was relieved of his roles with respect to Polyurethanes.  
6 Correct?

7 A Correct.

8 Q And Mr. Levi was reassigned to a different Dow business in  
9 Europe. Correct?

10 A Correct.

11 Q Mr. Wood had resigned and left the company. Correct?

12 A Correct.

13 Q And you replaced Mr. Fischer as Vice-President in charge of  
14 Polyurethanes. Right?

15 A It was a combination of replaying Mr. Wood and Mr. Fischer.

16 Q Correct. A combination of the two roles, but Mr. Fischer  
17 was out of the polyurethanes business and you replaced him,  
18 among other roles. Correct?

19 A Mr. Fischer was there for a while transitioning as he  
20 stayed on a few more months as well and helping me transition  
21 into the new role.

22 Q But again, as of January of 2004, you were in charge of the  
23 Polyurethanes business, not Mr. Fischer. Correct?

24 A That's correct.

25 Q And you testified previously that you weren't involved in

1 the Polyurethanes business prior to January of 2004. Correct?

2 A Correct.

3 Q So with respect to your testimony today, you're in no  
4 position to tell us anything about whether there was or was not  
5 a price-fixing conspiracy from 1994 to 2003. Correct?

6 A Not correct.

7 Q Well, you certainly didn't say anything in your direct  
8 testimony, did you, sir, about whether there was or was not a  
9 conspiracy in effect during 1994 to 2003. Correct?

10 A What I said is that I went through a lot of history in both  
11 written files and transitioning with some of the people that  
12 you mentioned to better learn the business. And as I was  
13 transitioning and reading through all those files, I did not  
14 see anything that would lead me to believe that there was  
15 anything that was going on from a conspiracy standpoint or  
16 anything that was being done in an illegal manner.

17 Q My question simply is that you weren't around in the  
18 Polyurethanes business during 1992 -- 1994 to 2003, and you  
19 don't really know, do you, whether there was a price-fixing  
20 conspiracy during that time?

21 A You're correct in that I was not there, I was not in  
22 Polyurethanes --

23 MR. BERNICK: Objection.

24 A -- but I think you're incorrect in that you have to learn a  
25 lot about the history and you spend a lot of time learning from

1 the people who were there. And I think if something had been  
2 going on, going through that transition and the time not just  
3 with those people but with customers as well, I would have  
4 thought I would have seen something. It would not have been  
5 uncommon to have customers or to see something suspicious come  
6 up.

7 I did see a lot of decisions that I didn't agree with,  
8 but that had nothing to do with anything being wrongdoing.

9 Q Let's talk about the historical financial statements that  
10 you looked at. You testified that when you took over in 2004,  
11 you looked at the historical financial statements. Correct?

12 A That's correct.

13 Q And you also testified on direct that you were familiar  
14 with the financial statements, not only with respect to 2004  
15 and later but also the earlier years. Is that right?

16 A That's correct.

17 Q You were trying to get an understanding for the past  
18 performance and how to project how the performance of the  
19 business would be in the future. Right?

20 A Correct.

21 Q And you've testified that it was critical for you to read  
22 those statements and understand them. Right?

23 A That's correct.

24 Q Now, you have testified previously that when you joined  
25 Polyurethanes in January of 2004, that the business was at the

1 very bottom of the business cycle. Right?

2 A It was in a trough. No question, it was -- it was not  
3 performing well.

4 MR. SCHAEFER: Todd, can you pull that up 4727. We'll  
5 start at line 10.

6 Q The question at line 10 is:

7 (Reading) Where was Polyurethanes -- when you joined  
8 in '04, where was Polyurethanes in the business cycle?

9 And your answer was: Well, like a number of  
10 businesses at that time, it was tough. And I would say it was,  
11 you know, pretty much in the bottom of a cycle.

12 That's what you testified, sir. Correct?

13 A Pretty much.

14 Q That is what you testified. Yes?

15 A Exactly. But "pretty much" doesn't necessarily mean it was  
16 at the bottom --

17 MR. BERNICK: I'm sorry, it's not impeachment. The  
18 question he was asked was: Didn't he testify that this  
19 business was at the very bottom.

20 Now the question has changed because the testimony has  
21 changed, so that's not impeachment.

22 MR. SCHAEFER: I understand.

23 THE COURT: All right. Go ahead.

24 MR. SCHAEFER: Okay.

25 THE COURT: Let's hear the next question.

1           THE COURT: I know what your objection is but it's  
2           overruled for now.

3           Go ahead.

4           Q    You testified, didn't you, sir, that the Polyurethane  
5           business was pretty much in the bottom of the cycle. Correct?

6           A    Correct.

7           Q    And you said that when you took over, there was weak demand  
8           and Dow didn't have a lot of leverage in the market to improve  
9           your prices or margins. Correct?

10          A    I lost this on the monitor. Sorry.

11          Q    I'm just asking the question. You said that when you took  
12          over there was weak demand and Dow didn't have a lot of  
13          leverage in the market to improve your prices or margins.  
14          Correct?

15          A    Correct.

16          Q    And you said that became even more clear to you later when  
17          you looked back at 2004, you testified that there was no doubt  
18          in your mind that 2004 was the bottom of the business cycle.  
19          Right?

20          A    Definitely it was in the -- it was tough, the conditions  
21          were tough, it was near the trough or in the trough.

22               MR. SCHAEFER: Come back to that page, Todd, that was  
23          just up there, 4727.

24          Q    And we'll look at line 18. And this is a continuation of  
25          your answer from the previous, what you said at line 18:



1                   (Reading) So it's very tough conditions, and you never  
2 know where you are in the cycle sometimes until you look  
3 backwards. And when you look backwards it's a lot clearer.

4                   And so it felt like the bottom. And looking backwards  
5 a year later, we were definitely in the bottom of a cycle.

6       A     Yes, I said that.

7       Q     And you also testified, did you not, sir, that the, quote,  
8 the worm turned in 2004, meaning that Polyurethanes went from a  
9 buyer's market to seller's market. Right?

10      A     Correct.

11      Q     And, in fact, during your direct examination today when Mr.  
12 Bernick put up the three charts and drew a line right down the  
13 middle at 2004, you testified that the market pre January 2004  
14 was fundamentally different than the market post January 2004.  
15 Correct?

16      A     That's right.

17      Q     And the reason for that is that you said demand improved  
18 and supply became tighter, and as a result you had to charge  
19 higher prices. Right?

20      A     Right.

21      Q     Okay. Let's take a look back at DX-8693, which is the  
22 summary exhibit you testified about.

23                   Do you remember your testimony about this summary,  
24 sir?

25      A     It was two years ago, so...

1 Q Well, this is the summary that you were shown today --

2 A Yes.

3 Q -- by Mr. Bernick.

4 A Correct.

5 Q And you testified on direct that the first page here  
6 reflects Dow's margins for MDI. Correct?

7 A Correct.

8 Q Now I'm going to focus a little bit on the purple line  
9 which is the line for E-B-I-T, EBIT. Do you see that, sir?

10 A Yes, I do.

11 Q And you testified that EBIT means "Earnings Before Income  
12 Taxes." Right?

13 A Correct.

14 Q And EBIT, like these other measures up here, is one way of  
15 measuring Dow's profitability in the marketplace. Correct?

16 A Yes.

17 Q I think you said something to the effect that this was your  
18 scorecard when you were running the business. Right?

19 A Correct.

20 Q And for my next series of questions I will be referring  
21 continuously to the EBIT line. I may even refer to it as Dow's  
22 margin, but I just want to make sure that you understand that  
23 I'm going to be focusing on EBIT here specifically. Okay? You  
24 understand that?

25 A Yes.

1 Q Is it correct that at least according to this chart, Dow  
2 was making money, again looking at EBIT specifically, every  
3 year from 1995 through 2000 -- well stop with 2001. Is that  
4 right?

5 A Yeah, 2002, looks like a break even on EBIT.

6 Q That's right. In 2001 you were still in positive  
7 territory. Right?

8 A That's right.

9 Q And then 2002 and 2003 we're both right around break even  
10 points on EBIT. Is that right?

11 A That's right.

12 Q And just to be clear, in 1995 through 2001, those are all  
13 part of the conspiracy period that's alleged in this case.  
14 Correct?

15 A That's correct.

16 Q Now, according to this graph, Dow's profits on MDI peaked  
17 around \$.30 per pound in 1996. Correct?

18 A Yes.

19 Q So essentially that means that Dow made \$.30 for every  
20 pound of MDI that was sold that year. Right?

21 A Of EBIT, yes.

22 Q On an EBIT basis. Correct?

23 Now, are you aware, sir, that Dow produced with --  
24 with this chart here in Exhibit 8693, some -- some backup data  
25 in the form of financial reports? Are you aware of that?

1 A I'd have to see that again to recall it, I believe.

2 Q There's in your folder there in front of you, actually the  
3 one that's marked 8693, you'll see that there are excerpts from  
4 that backup data.

5 MR. SCHAEFER: Counsel, you have a copy there as well.

6 MR. BERNICK: Yes. Thank you very much.

7 A Okay.

8 Q And you'll see, in addition to the chart, there are three  
9 separate pieces of paper, each stapled, one for MDI, one for  
10 TDI and one for polyols. Do you see that?

11 A Yeah, got it.

12 Q And the first page, just to get you oriented at what you're  
13 looking at it, the first page are the numbers that are in the  
14 backup data that forms the basis for these charts here. So in  
15 other words, each of those data points corresponds with a point  
16 on the chart. Do you understand that?

17 A Yes.

18 Q And then if you flip to the second page of each of those  
19 packets there you'll see the full table with the financial data  
20 that was used to create the model. Do you see that?

21 A Yes, I do.

22 Q Now, having seen those, have you reviewed that data before  
23 today?

24 A I don't recall the last time I reviewed this data.

25 Q At any point in your preparation for your testimony today,

1 did you review the data that was used to create the summary  
2 chart that you've testified about?

3 A I've reviewed the chart, but I have not reviewed the actual  
4 data here --

5 Q Okay.

6 A -- that you're now pointing me to.

7 Q Fair enough. At some points in the examination I may refer  
8 you to the backup data and point to some specific numbers in  
9 there. That's what I'm referring to when I say that.

10 A Okay.

11 Q Okay.

12 MR. SCHAEFER: Todd, if you can pull up the big  
13 financial table for MDI.

14 And if you could blow up the volume for 1996. The top  
15 row. Up here (indicating).

16 Q Okay. Do you see that according to the backup data that  
17 was produced with this chart, that Dow had net trade units of  
18 around 256 million of MDI in 1996? Do you see that?

19 A Yes.

20 Q And as I understand it, net trade units refers to pounds,  
21 which is the same measure on the chart itself, in 8693. Do you  
22 see that?

23 A Yes.

24 Q So, in other words, 250,000 -- 256,359,000, that refers to  
25 number of pounds. Is that how you understand it as well?

1 A Yes.

2 Q So just to put the profitability numbers on an EBIT basis  
3 in 1996, if Dow sold 256 million pounds of MDI in 1996 and  
4 earned \$.30 per pound before taxes, that means that Dow earned  
5 around 75 million on MDI in 1996 alone. Correct?

6 A Correct.

7 Q And that's also the number that's at the bottom of the  
8 chart there. Correct? 75,625,000?

9 A Yes.

10 Q Okay. Now coming back to these charts, we've seen that  
11 EBIT stayed positive but trended downward from '96 through  
12 2002. Correct?

13 A Correct.

14 Q And then we see here that profits plummeted from around  
15 breaking even 2003 to -- let's see here -- negative \$.26 per  
16 pound in 2004. Is that right?

17 A Yes.

18 Q Now, 2004 was the first year after the alleged conspiracy  
19 period in this case ended. Correct?

20 A Yes.

21 Q So just to put that number of negative \$.26 per pound in  
22 context again, do you see in the backup data that Dow sold  
23 about 162 million pounds of MDI in 2004?

24 A Yes.

25 Q And that was, again, your first year in the business?

1 A Yes.

2 Q So according to the backup data, Dow lost about \$41 million  
3 in MDI in 2004. Is that right?

4 A That's right.

5 Q Okay. So Dow's earnings then continue to fall from about  
6 \$.26 per pound to \$.32 per pound from 2004 to 2005. Right?

7 A Right.

8 Q So again, according to the backup data that Dow provided  
9 with the chart, Dow lost another \$48 million in 2005. Correct?

10 A Correct.

11 Q And then for one more year Dow's profits continued to fall  
12 from around \$.32 per pound to the bottom here, which is  
13 negative \$.43 per pound from 2005 to 2006. Correct?

14 A Correct.

15 Q So Dow lost even more money on MDI in 2006. Right?

16 A Yes.

17 Q And to be precise, Dow lost another 57 million in 2006.  
18 Correct?

19 A Correct.

20 Q All right. So just to recap: According to this summary,  
21 Dow made money or at least broke even on MDI every year during  
22 the alleged conspiracy period from 1995 to 2003. Correct?

23 A Yes.

24 Q And then the first three years after the end of the alleged  
25 conspiracy, Dow lost 41 million in 2004; 48 million in 2005;

1 and 57 million in 2006. Correct?

2 A That's what the numbers say, that's correct.

3 Q Is it fair to say, then, that for MDI at least, 2006 was  
4 the low point in the business cycle, not 2004?

5 A I wouldn't say it was the low point in the business cycle.  
6 I'd say it was the low point for Dow based on the fact that we  
7 were having operating problems with our plants and we had  
8 brought a new plant on that was having a lot of problems and we  
9 were spending a lot of money on fixing it, and that's what get  
10 reflected in EBIT. But as you can see from the top line, the  
11 margin, the prices were improving in that period.

12 Q Well, to focus specifically on Dow then as opposed to the  
13 business cycle for polyurethanes more generally, is it fair to  
14 say that the bottom of the business cycle for Dow's MDI  
15 business was 2006?

16 A The bottom of our profitability was in 2006.

17 Q And isn't the -- isn't profitability a measure for when the  
18 bottom of the business cycle is for any business?

19 A I'll call -- I think there's a distinguished difference  
20 between profitability in a given year and a cycle. I think  
21 that profitability, if it's impacted by things that are under  
22 your control that aren't going as planned like we were having  
23 in our operations, I think that's different than a cycle that's  
24 being impacted by industry supply/demand fundamentals.

25 Q Okay. So just to be clear, your testimony is that despite



1 that the line continues down in 2006, in your mind the bottom  
2 of the business cycle was really right here in 2004? That's  
3 what your testimony is?

4 A Yes.

5 Q Now, you testified that MDI demand improved dramatically in  
6 2004. Correct?

7 A That's correct.

8 Q And you said that the MDI market went from a buyer's market  
9 to a seller's market in 2004. Correct?

10 A It was starting to change. And the difference is, it's one  
11 thing when the actual numbers are changing and there's a  
12 difference when buyers actually perceive that. So there can be  
13 some lag time between the reality of what's going on versus how  
14 customers see it.

15 Q Now, just to be clear, you testified previously, didn't  
16 you, sir, that 2004 was the turning point. That's when you say  
17 the worm turned. Right?

18 A It was starting to turn in that time frame, and it turned  
19 at different points in time for TDI, MDI and polyols. You  
20 can't tie the three together at a very specific point in time.

21 Q So when you testified both previously in 2013 and also on  
22 direct here that this precise fundamental change here in  
23 January 2004, what you're saying now is that that's not exactly  
24 accurate. Correct?

25 MR. BERNICK: Objection.

1 A No, I'm not saying that.

2 MR. BERNICK: It mischaracterizes his prior testimony.

3 THE COURT: No. Overruled. If he did, he'll correct  
4 it.

5 BY MR. SCHAEFER:

6 Q Okay. So now let's shift focus and talk about TDI. And  
7 we'll try to move this a little more quickly.

8 So if we look at the backup data for TDI.

9 MR. SCHAEFER: If you can go to the second page.

10 Q Now, if we focus on the years 2003 through 2005.

11 Okay. Do you see here that on an absolute bottom line  
12 basis for EBIT, that Dow lost about 36 million -- 37 million,  
13 rather, on TDI in 2003?

14 A Let me take a look at this.

15 Yes, 36.7, right, 2003.

16 Q And in 2004, Dow's EBIT on TDI dropped to negative \$46  
17 million in 2004. Correct?

18 A That's correct.

19 Q So between 2003 and 2004, Dow's EBIT in TDI decreased by  
20 about nine million. Correct?

21 A That's correct.

22 Q And then if we move forward here to 2005 --

23 THE COURT: Nine million or --

24 MR. SCHAEFER: So from 37 million to 46 million is a  
25 difference --

1 THE COURT: You said nine million I think. Maybe I --  
2 90 million you mean?

3 Oh, nine million. Okay. I see what you're saying.

4 MR. SCHAEFER: Okay.

5 THE COURT: There's a difference between those two  
6 years. Okay.

7 MR. SCHAEFER: Correct. Thank you, your Honor.

8 BY MR. SCHAEFER:

9 Q So if we come back to 2005, we have negative 53 million in  
10 2005 on TDI. Correct?

11 A Correct.

12 Q So if you look at the EBIT profitability number in 2005 and  
13 compare it back to 2004, that's a difference of another seven  
14 million. Correct?

15 A That's right.

16 Q Now, you testified that there were some big changes in the  
17 TDI market beginning in late 2005, early 2006. Correct?

18 A Correct.

19 Q And you talked about the fact that two hurricanes hit in  
20 Louisiana: Rita and Katrina. Right?

21 A Yes.

22 Q And you said those were devastating to the chemical  
23 industry and fundamentally changed the industry. Correct?

24 A Yes.

25 Q And the Lyondell plant for TDI was hit never came back on

1 line. Correct?

2 A Correct.

3 Q And then you talked about a second fundamental change which  
4 was the fact that Huntsman sold their TDI business to BASF.  
5 Correct?

6 A Correct.

7 Q And when BASF bought Huntsman's TDI plant, they shut down  
8 the plant. Correct?

9 A That's correct.

10 Q And you said as a result of those two very significant  
11 changes, one-third of the capacity of TDI disappeared almost  
12 overnight. Right?

13 A That's right.

14 Q TDI capacity in late '05, early 2006 became very tight?

15 A Right.

16 Q And you said these events were unprecedented and  
17 game-changing for the TDI industry. Correct?

18 A That's right.

19 Q Given those fundamental changes which you said were  
20 unprecedented, if someone were to look at prices in 2005 and  
21 2006 and after and compare those to prices during 1994 and  
22 1993 -- and I'm just talking about doing this visually on a  
23 chart like this one here that Mr. Bernick showed you -- that  
24 would be a little bit like comparing apples and oranges.  
25 Right?

1 A In some respects, since conditions had changed, yes. On  
2 other aspects of capacity that was still around in the  
3 industry, things hadn't changed.

4 Q And --

5 A Some capacity remained, some capacity exited.

6 Q But based on the fact that one-third of the capacity came  
7 out of the market, if you're just looking at the absolute  
8 prices, the price lines --

9 A Sure.

10 Q -- and I'm pointing to MDI but you understand I'm referring  
11 to TDI -- the prices after those events and before are  
12 completely different. Correct?

13 A Different fundamentals, that's correct.

14 Q Okay. Now let's move on to polyols.

15 To make a polyol you need to start with a product  
16 called propylene oxide. Correct?

17 A Correct.

18 Q And is propylene oxide sometimes referred to in shorthand  
19 as "PO"?

20 A That's right.

21 Q So if I say "PO," you understand I'm referring to propylene  
22 oxide. Okay?

23 A Sure.

24 Q Okay. And I think you said today, or somebody said today  
25 around 60 or 70 percent of the content of polyols is propylene

1 oxide? But I believe you testified previously that it's at  
2 high as 80 percent. Correct?

3 A Yes. It depends on the polyol.

4 Q And Dow manufactures propylene oxide. Correct?

5 A Correct.

6 Q And it's true, isn't it, that the propylene oxide that Dow  
7 used to make polyols is generally self-produced?

8 A Correct.

9 Q In other words, most of the propylene oxide that Dow's  
10 polyol business consumes is also manufactured by Dow?

11 A Correct.

12 Q Do you agree that the business model for Dow's  
13 Polyurethanes business is influenced by its position as a  
14 producer of propylene oxide?

15 A Yes.

16 Q And do you agree that to understand Dow's business model in  
17 urethanes you also need to take into account and understand  
18 Dow's business model in propylene oxide?

19 A Partly so.

20 Q Well, do you agree that Dow was trying to maximize the  
21 return on its investment in propylene oxide?

22 A Yes, through a variety of ways that we can use that  
23 propylene oxide in the company.

24 Q Is it fair to say that if someone was trying to get a  
25 complete picture of the profits that Dow makes in the sale of

1 polyols -- and again I'm referring to the polyols that are  
2 self-produced, PO -- is it fair to say that to get a complete  
3 picture of the profits on the polyols you also need to take  
4 into account any profits that Dow made on the sale of the  
5 propylene oxide? Is that a fair statement?

6 A Not 100 percent.

7 Q Well, let me ask it this way: Do you know for the purposes  
8 of the chart which we were looking at before in 8693, how did  
9 Dow account in the financial statements that are the backup of  
10 for those summaries for any profits that Dow earned on the PO  
11 business?

12 A Can you ask that question again? Sorry.

13 Q Sure.

14 For the polyol summary in Exhibit DX-8693, how did Dow  
15 account in the financial statements that accompany that summary  
16 for the cost of the PO that Dow self-produced?

17 A How did Dow do that?

18 Q Yes.

19 MR. BERNICK: Objection. Lack of foundation at this  
20 point.

21 MR. SCHAEFER: Well, your Honor, this witness hasn't  
22 been offered as a summary --

23 THE COURT: Overruled.

24 MR. SCHAEFER: Okay.

25 A So how did Dow account for the cost of that PO?

1 Q Yes. And any profits that --

2 A Okay. So I just wanted to make sure I understood the  
3 question.

4 So the way Dow would account for the cost of that PO  
5 is based on the cost of propylene. Propylene is a big  
6 component of making propylene oxide, and then converting that  
7 propylene to PO. And so the cost starts with the raw material,  
8 and then you convert that raw material into propylene oxide,  
9 and when you're making propylene oxide you also make another  
10 product called propylene glycol. It's a co-produced product.

11 And if propylene glycol demand is strong and you can  
12 sell more propylene glycol, that will actually help improve the  
13 profitability of propylene oxide and it will also determine the  
14 cost of that propylene oxide if you're using that co-produced  
15 unit at a higher capacity utilization.

16 Q If I may just jump in.

17 My question is really just focused on, let's take a  
18 hypothetical for a minute.

19 A Okay.

20 Q So let's stay that on the chart for 8693 we see a  
21 30-cent -- a 30-cent per pound profit.

22 A On polyol?

23 Q On polyols.

24 A Okay.

25 Q For the summary for polyols. Do you follow so far?



1 A Okay.

2 Q And let's say -- well, let's say in a given year that for  
3 the sale of polyols, Dow's PO business earned \$.20 per pound on  
4 the polyol -- on the propylene oxide -- let me back up, I might  
5 have butchered that. I apologize.

6 Let's say in a given year that Dow's PO business  
7 earned a 20-cent per pound profit on the PO portion of the --

8 A Are you talking about EBIT, are you talking about standard  
9 margin or gross margin from a profitability standpoint?

10 Q Let's talk about EBIT which is the line we were focused on  
11 before.

12 A Okay.

13 Q Okay. So \$.20 per pound on the profit and sale of PO. In  
14 addition to that, Dow's polyurethane business earned a ten  
15 cents per pound profit on the sale of the polyols to the  
16 downstream customer. Do you follow the hypothetical so far?

17 A Okay. Okay.

18 Q So my question is simply whether the statements, the  
19 summary we were looking at before would show the 30-cent per  
20 pound profit or just the ten-cent per pound profit which is  
21 only the polyol portion. Do you follow?

22 A I think so.

23 Q But you're not sure?

24 A I'm not sure.

25 You know, a large majority of our propylene oxide goes

1 in to making polyols. We make many different types of polyols,  
2 hundreds of different types of polyols. And so that the  
3 profitability of that polyol can vary differently -- can vary a  
4 lot depending on where you're selling that polyol. Because  
5 propylene oxide is just one product, one product that you can  
6 sell. You can sell it -- some of it to the merchant market,  
7 you can sell some of it goes into other propylene oxide  
8 derivatives that Dow Chemical makes, but a lot of it, 60  
9 percent of it probably goes into making polyols.

10 So I think I'm following your question. But I was  
11 just trying to help make sure I do understand it so I can  
12 answer it accurately.

13 Q I think you did, but let me ask one more quick follow-up on  
14 that.

15 Just generally in your reporting in the Polyurethane  
16 business when you were vice-president, when you were reporting  
17 on your financials for the polyols, did those profits include  
18 any profits that were embedded in the PO portion?

19 A Got it. Okay.

20 So what happens is we transfer that cost of propylene  
21 oxide, we transferred it at cost into polyols. So the polyols'  
22 profitability benefits from that cost transfer of PO into  
23 polyols. We also take propylene oxide and sometimes we will  
24 sell that to the merchant markets, somebody that wants to buy  
25 PO for other types of opportunities, so that's a different

1 profitability.

2 Q I'm not talking about that portion of the PO market, I'm  
3 talking about the self-produced --

4 A The value of the PO and the profitability that we make in  
5 polyols, that value of PO is embedded in that polyol  
6 profitability.

7 Q Okay. So moving along. So let me come back to 8693.

8 A I'm sorry. It's a little complicated, I realize,  
9 how we get integrated and transfer the cost of our upstream raw  
10 materials like propylene oxide that goes into polyols. So I  
11 wasn't trying to ignore your question, I was just trying to  
12 explain the accounting which is probably too complicated.

13 Q I understand. We were a little confused with it as well.

14 All right. So coming back to 8693, is it true that  
15 this summary we've been looking at for all three products, MDIs  
16 polyols and TDI, has no data for 1994?

17 A I don't see any data there for 1994, correct.

18 Q So the jury or anyone looking at this chart can't tell what  
19 Dow's profits would have been in 1994. Correct?

20 A That's correct.

21 Q And it's also true, isn't it, that the margin summaries  
22 we've been looking at have no data for 1992 to 1993?

23 A That's correct.

24 Q So again, the jury or anyone else looking at these  
25 summaries won't know what Dow's profits were immediately

1 preceding the beginning of the alleged conspiracy. Correct?

2 A Correct.

3 Q Now, the jury has heard testimony from Mr. Ho yesterday I  
4 believe, and Mr. Ho testified that 1992 and 1993 was another  
5 bottom of the business cycle for Dow's urethane business. My  
6 question is just simply: The jury has no way to tell by  
7 looking at these summaries whether that was, in fact, true.  
8 Correct?

9 A That's correct.

10 Q All right. I want to switch gears and go to one last  
11 topic. We'll should be almost done here.

12 Stephanie Barbour testified that she kept notes of  
13 debriefing sessions that she attended with Marco Levi and David  
14 Fischer at which Mr. Levi discussed his pricing conversations  
15 with Mr. Hartwig of BASF. Are you familiar with that  
16 testimony?

17 A To be honest, I don't recall that.

18 Q Well, I'll make that representation to you --

19 A Okay.

20 Q -- that she did testify to that and the jury has heard that  
21 testimony in this case.

22 Now, Ms. Barbour also testified that the notes that  
23 she kept during those debriefing sessions were still on her  
24 computer when she left Dow in early 2004. Okay? So I'm just  
25 going to ask you a few questions about that.

1                   When you took over as Vice-President of Polyurethanes  
2                   and you assumed operational responsibility for Ms. Barbour's  
3                   area, you testified on direct that you tried to get access to  
4                   her computer files. Right?

5                   A     Correct.

6                   Q     And you said this was around January or February of 2004?

7                   A     January.

8                   Q     Okay. And you also testified today that her old emails  
9                   were password-protected. Correct?

10                  A     Yes.

11                  Q     So you went to the IT department to get access?

12                  A     Correct.

13                  Q     And IT came back and said you have to go back to Mr.  
14                  Fischer. Correct?

15                  A     Correct.

16                  Q     Now, to be clear, when you went back to Mr. Fischer and  
17                  spoke to IT, all you did was make a specific request for  
18                  certain types of files that you needed for your business  
19                  purposes. Isn't that right?

20                  A     I believe I asked for all the files that related to the MDI  
21                  and the TDI.

22                         MR. SCHAEFER: Todd, can we go to 4785.

23                  Q     Okay. So we start at line 9 on page 4785.

24                         The question was: (Reading) You didn't select any of  
25                  Ms. Barbour's documents yourself for retention or destruction,

1 did you?

2 ANSWER: I had a specific request on what I was  
3 looking for in those files to my IT manager.

4 QUESTION: And those were the documents you needed for  
5 your business purposes. Right?

6 ANSWER: That's right.

7 That's what you testified. Right?

8 A Yes.

9 Q You didn't specifically ask for any personal notes that she  
10 may have written to herself. Correct?

11 A That's correct.

12 Q And at no point in time did you need to go poking around,  
13 if you will, in Ms. Barbour's computer for certain files. You  
14 just asked the IT department to give you the files you asked  
15 for. Right?

16 A That's right.

17 Q And aside from the files that IT sent to you, you had no  
18 role whatsoever in either the preservation or the destruction  
19 of whatever else might have been on Ms. Barbour's computer.  
20 Correct?

21 A That's correct.

22 MR. SCHAEFER: Okay.

23 No further questions. I pass the witness.

24 THE COURT: All right.

25 Redirect in the limited area of cross, please.

1 MR. BERNICK: Yes.

2 REDIRECT EXAMINATION

3 BY MR. BERNICK:

4 Q Ms. Barbour testified to this jury by video as part of the  
5 plaintiffs' case as follows.

6 MR. BERNICK: This is at page 505 of the first  
7 deposition I think.

8 Q QUESTION: Did they -- did you -- what happened to the  
9 notes after the meeting?

10 It's the notes -- you wouldn't know but there's a  
11 meeting.

12 ANSWER: They are gone.

13 QUESTION: They are gone? What happened to them?

14 ANSWER: I destroyed them.

15 Ms. Barbour destroyed them, said she destroyed them.

16 The question to you is: Were you -- did you have any  
17 knowledge of what she did with her notes?

18 MR. SCHAEFER: I object to the question, to the form  
19 of the question because in that portion of her testimony she  
20 was referring to hard copies of her notes --

21 MR. BERNICK: I'm going to get there.

22 MR. SCHAEFER: Okay.

23 THE COURT: All right.

24 Q (Reading) QUESTION: -- and then the question is:

25 At the time you destroyed the hard copies of the note,

1 did you believe that there existed on your personal folder of  
2 Dow's computer systems that they still existed -- did you  
3 believe that they still existed on your personal folder of  
4 Dow's computer systems? Is that right?

5 And her answer was: I didn't know because I didn't  
6 have access anymore to my computer.

7 QUESTION: So you didn't know one way or the other?

8 ANSWER: Right.

9 Again, do you have any personal knowledge of any of  
10 these things?

11 A No.

12 Q Thank you.

13 It was pointed out by counsel that with respect to the  
14 backup information relating to these charts that you've  
15 displayed, that the backup information for 1993, 1994, 1992,  
16 that Mr. -- the period that Mr. Ho talked about, was not set  
17 forth on those charts.

18 MR. BERNICK: Could we just show those charts again;  
19 that is, Exhibit DX-8693.

20 Q And, in fact, it does begin in 1995. Do you see that?

21 A Yes.

22 Q Do you know whether the information, the comparable  
23 information for the earlier years was available in the same  
24 format that it was available for the later years? Do you know  
25 one way or the other?



1 A Let me make sure I understand the question. So the backup  
2 data --

3 Q Yes.

4 A -- was it available?

5 Q Do you know whether at the time that this was prepared,  
6 whether this information was available in the same kind of  
7 format for the years before 1995 that it was available for the  
8 years beginning in 1995? Do you know?

9 A No.

10 THE COURT: No, you don't know?

11 THE WITNESS: No, I don't know.

12 THE COURT: No, he doesn't know. Okay.

13 Q Right.

14 So in terms of whether the jury can ascertain what  
15 happened to MDI, MDI in the period 1994 and earlier that Mr. Ho  
16 did talk about, I want to direct your attention to DX-1170  
17 which was shown to you a little while ago on direct  
18 examination.

19 MR. BERNICK: If we could show 1170, page 5.

20 Can you blow up that chart.

21 Q In fact, do we see in this chart shown to the jury on your  
22 direct examination that this does talk about the last cycle,  
23 Dow's MDI business, EP, economic profit, during the period of  
24 time that Mr. Ho did talk about during his testimony, and shows  
25 the trend of economic profit during the period of time, and it

1 picks up with the peak in the mid '90s that's on the prior  
2 chart?

3 A Yes.

4 MR. SCHAEFER: I object to form and foundation. The  
5 witness wasn't involved in the business in '92 and '94.

6 THE COURT: That's all right, it's overruled.

7 Q What was your answer?

8 A Yes.

9 Q In fact, I think -- well, I won't cover it again because I  
10 covered it in my direct.

11 If we talk for a moment about some of the performance  
12 information. Let's just take a look -- I don't know if you  
13 have this on the system.

14 DEFENDANT'S TECH: I'm not sure. Do we have an  
15 exhibit number?

16 MR. BERNICK: Okay. Can you show -- this is MDI.

17 Okay. If you could blow that up as you did there --  
18 yeah, that was I think the one you showed. Right. And you  
19 went from --

20 Q You remember you were asked questions, Mr. Dawson, about  
21 1996, 56 million -- 256 million units sold and profits of 75  
22 million?

23 A Yes.

24 Q Do you recall that?

25 And all these figures --

1 MR. BERNICK: That's fine. Thank you.

2 Now, if you can just blow up the bottom line beginning  
3 in 2002 for me for a minute.

4 Q And does it show that again, as you get to the bottom line  
5 we get losses of, steady losses beginning even on an EBITDA  
6 basis from 2002 going forward?

7 A Correct.

8 MR. SCHAEFER: Objection. The 2003 shows a  
9 positive --

10 MR. BERNICK: You're right. You're right. That's  
11 fine. I accept that correction.

12 And then it goes back down again in later years.

13 A Correct.

14 Q Now, this is -- this is EBIT. I think you testified --

15 A Yes.

16 Q -- this is EBIT.

17 What about the cost of the plants that are producing  
18 all this material? Is that anywhere included in EBIT?

19 A The costs -- when it comes to the capital cost and the  
20 inventory, no, that's not included in EBIT. That gets  
21 reflected lower and then eventually gets reflected in the  
22 economic profit.

23 Q Is there a reason why Dow calculates economic profit? Is  
24 there a reason why?

25 A Yes.

1 Q And is it -- is it something that's kind of not real, or is  
2 it real?

3 A It's very real.

4 Q And again, is there -- when you presented the --

5 MR. BERNICK: Let's go back to the basic charts  
6 because then I'll use these. It's Exhibit 8693.

7 Q When Dow goes through and presents economic profit, is that  
8 something that it actually uses and relies upon ordinarily in  
9 its business, or is it something that serves some other  
10 purpose?

11 A No, it's used in all businesses as an indicator of  
12 profitability.

13 Q Okay. Now, there were questions to you --

14 MR. BERNICK: If we go to MDI, that's the first one.

15 Q There were questions to you about whether the cycle  
16 actually bottomed out later on. Do you recall that?

17 A Yes.

18 Q And I think you said, well, this is the Dow cycle.

19 Is this just -- are these numbers here gross margin,  
20 contribution margin and the like, or are these just, you know,  
21 market factors, or are there other factors that are included in  
22 reaching those numbers?

23 A There's other factors included.

24 Q If we want to talk about the number that's closest to the  
25 market's -- market's number or shows the market trend, which of

1       these -- which of these lines come closest to mirroring the  
2       market?

3       A     The Trade Standard Margin is the better reflection of  
4       what's going on in the market because it reflects the selling  
5       prices that we're getting working with certain -- you know,  
6       with our customer base, and of course a lot of those customers  
7       are doing business with our competitors as well.

8       Q     When we talked about on direct examination the cycle, were  
9       we talking about all the other costs to Dow, or were we talking  
10      about market prices, industry median market prices as reflected  
11      by Dr. Raiff?

12      A     We were talking about market prices of --

13      Q     Is there any inconsistency between -- does the fact that  
14      these went down, these other numbers went down, does that  
15      change any piece of your testimony regarding the business cycle  
16      on your direct examination?

17      A     Not at all.

18      Q     Now, there were then points made or questions that were  
19      asked about this portion of the curve. You remember that?  
20      Counsel pointed out that, gee, during the course of the  
21      conspiracy there was positive EBIT. This purple line for every  
22      day of the conspiracy -- every year of the conspiracy that's on  
23      this chart, except maybe it dipped down a little bit in 2002.  
24      Do you recall that?

25      A     Yes.

1 Q Now, apparently -- you just tell me -- so, this period of  
2 time here, what counsel was asking is whether, as this  
3 conspiracy, alleged conspiracy progressed, he's asking -- was  
4 he asking you whether Dow made less and less and less money as  
5 the conspiracy progressed? Is that how you understood the  
6 question?

7 MR. SCHAEFER: Objection, leading.

8 THE COURT: Overruled. I'll allow it.

9 A I understood the question he was asking me about Dow's  
10 profitability, not the industry profitability.

11 Q Right. And on that -- on that idea, that is, that this  
12 somehow reflects the conspiracy, what does that actually say  
13 about whether the alleged conspiracy was good for Dow?

14 A Well, if there was one, it certainly doesn't look like it  
15 was good for Dow from these numbers.

16 Q So to the extent that -- he also pointed out that the line  
17 then becomes even steeper after the alleged conspiracy. Do you  
18 remember that?

19 A Yes.

20 Q Can you explain to this jury why things actually got worse  
21 after 2000 -- during the course of 2003 and thereafter for MDI?  
22 I think you referenced it --

23 A For Dow?

24 Q For Dow.

25 A Yeah. They got worse because we were in the process of

1 building a new plant in Freeport, Texas, and unfortunately one  
2 of the first things I had to do on the job was to go get an  
3 exception request from our CEO, Bill Stavropulos, for \$45  
4 million to correct some mistakes that had been done in building  
5 that plant. And so we had some additional costs associated  
6 with that plant. We were also in the process of shutting down  
7 some old assets in LaPort, Texas for MDI as well. We were  
8 having some problems there that was causing us to spend some  
9 money. It gets reflected in the Dow results.

10 Q Now, if the allegation that counsel asked you about in this  
11 case is a price-fixing allegation; that is, the conspiracy that  
12 he was asking you about allegedly goes from '94 to 2004, '94 a  
13 little bit earlier through 2004 right here, price-fixing. If  
14 we take a look at the actual number that most closely resembles  
15 price, do you see any significant change whatsoever in the  
16 level of standard trade margin before, either for -- my  
17 goodness, from 1999 all the way forward through 2003 and  
18 thereafter other than it's going up?

19 MR. SCHAEFER: Objection to the form, leading, and  
20 argumentative.

21 THE COURT: It is leading,

22 Q Just use this price. You tell the jury one way or the  
23 other whether you see there's some market difference --

24 A Right.

25 Q -- between the way that curve is behaving before and after

1 the end of the alleged conspiracy.

2 A Sure. Let me just interpret the way I see that curve.

3 I see that curve as having some, obviously some  
4 volatility in it. But, you know, certainly if you look at from  
5 the '99 or even from the '98 time frame, if you look at the low  
6 point, you know, the low points are fairly stable to maybe  
7 improving just very slightly. The high points of, like, '99,  
8 2002 and 2005, you know, if you draw a straight line through  
9 that it's been pretty stable to maybe slightly improving as you  
10 get into that '04, '5 time frame. But it's pretty stable with  
11 the exception of maybe some spikes, but it comes back down to  
12 that stable level.

13 Q A couple more questions and we'll be done.

14 MR. BERNICK: Can we turn on the ELMO just very  
15 briefly.

16 Q You were asked a question about your prior testimony  
17 concerning, quote, "when the worm turned."

18 A Right.

19 Q And I think that the reference was to this part of your  
20 testimony that we have here.

21 MR. BERNICK: Right there.

22 Q So you see where:

23 (Reading) QUESTION: Just jumping forward to the  
24 future, as the period of time from 2004 through 2008 unfolded,  
25 how did the cycle develop?



1           The answer: Well, probably -- I always like to say  
2     "the worm turned."

3           Then you go on to say: (Reading) The worm turned in  
4     that it went from a more or less buyer's market where the  
5     product was long and plentiful, in that 2004, '5, '6, '7 time  
6     frame, it definitely went to more of a seller's market because  
7     things got tighter.

8           Is there anywhere you said in that testimony that all  
9     of a sudden it did a U-turn in 2004?

10    A    No, that's what I was trying to explain earlier, and that's  
11    why I tried to explain before about this, the tipping point  
12    that occurred in this time frame.

13    Q    I want to go back to 8693. First page 1.

14           MR. BERNICK: Thank you.

15    Q    In terms of profitability, the bottom line profitability,  
16    as counsel pointed out, things got worse after -- worse -- here  
17    we are in the beginning of 2004. We can see that they turned  
18    worse before they get better.

19           If we go to TDI, the next slide, here we are in 2004.  
20    And even between 2004 and 2005, tell me whether there is a  
21    change in the direction of EBIT already in -- between 2004 and  
22    2005.

23    A    Correct, that's what the graph shows.

24    Q    And now let's do polyols. Here we go. 2004. Right  
25    turn -- left turn.

1 A Correct.

2 Q Are you comfortable that there was, in fact, as you  
3 testified, the worm turned in that it went from a more or less  
4 buyer's market where the product was long and plentiful, and  
5 that 2004, '5, '6, '7, '8 time frame it definitely went to more  
6 of a seller's market because things got tighter.

7 Are you comfortable with that?

8 A I'm comfortable with that.

9 Q You were asked a question about apples and oranges, whether  
10 it's fair to make a comparison between prices during these --  
11 what you said were different markets.

12 This is MDI, but this is a different. I think it's on  
13 all the different boards. You remember that question?

14 A Yes.

15 Q Whether it's fair to compare prices between these two  
16 periods because it's apples and oranges, or words to that  
17 effect. Do you recall that?

18 MR. SCHAEFER: I'll object. I was referring  
19 specifically to TDI during that --

20 MR. BERNICK: All right. I'll take TDI. Fair point.  
21 That's correct.

22 Q Would it be fair to do an analysis of Dow's business, the  
23 business economics that you were referring, that you've talked  
24 about, would it be fair to do an analysis of Dow's business  
25 assuming that the market before 2004, the business market

1 before 2004 is the same as the business market after 2004 -- or  
2 beginning in 2004 going forward?

3 A Yeah, the overall fundamental --

4 MR. SCHAEFER: I'm sorry, I don't mean to interrupt.

5 I'll object. This witness is not offering an opinion  
6 on analysis of prices before and after.

7 MR. BERNICK: I'll --

8 THE COURT: Rephrase it.

9 MR. BERNICK: I'll rephrase my question.

10 Q My question is: Counsel asked you about comparing apples  
11 and oranges.

12 As a businessman talking about the business market  
13 conditions, would it be appropriate to compare prices and  
14 circumstances surrounding prices before and after the beginning  
15 of 2004 on the assumption that business conditions were the  
16 same?

17 A Yeah, you'd want to make that comparison to see what had  
18 fundamentally changed in the marketplace, but you need to look  
19 at the total picture of the capacity and the demand and what  
20 was going on also with raw material prices to get the full  
21 picture of what was going on.

22 Q And in your view, has anything that counsel asked you  
23 changed your testimony that there were differences between the  
24 business market before the end of the alleged conspiracy and  
25 after the end of the alleged conspiracy?

1       A     No.   No.   Nothing changed it.

2               MR. BERNICK:   That's all I have.

3               THE COURT:   Any recross?

4               MR. SCHAEFER:   No, your Honor.

5               THE COURT:   All right.   All right, Mr. Dawson, you can  
6   step down.   Thanks very much.

7               (Witness excused.)

8               THE COURT:   Ladies and gentlemen, we'll recess for the  
9   day then.

10              Let me give you a little bit of a heads-up so you can  
11   maybe plan.   We're not going to have Court on Monday, April 4th  
12   and we're not going to have court on Friday, April 8th.   It's  
13   not going to put us behind, okay, but for a number of reasons  
14   that are not involved with this case.

15              So we won't have Court on Monday April 4th, we won't  
16   have court on Friday, April 8th.   Okay?

17              Tomorrow we'll do a full day.   We'll start at 8:30 and  
18   go to 4:00, 4:30, wherever we end up, okay, with lunch.

19              Once again, I want to thank you for your attention and  
20   really your being here promptly and your attention.   So I want  
21   to compliment you on that again.

22              Please don't discuss the case.   As it goes on  
23   sometimes you forget and you get tempted, but it would be a  
24   violation of your oath if you were to start to discuss the  
25   case.   There's still more to go.   Okay?

1           We'll see you tomorrow morning at 8:30. Thanks.

2           (The Jury leaves the courtroom.)

3           THE COURT: Everyone, be seated.

4           Let me address the issue of the admissibility of  
5 deposition exhibit number 23. That's it, right?

6           MR. BERNICK: If --

7           THE COURT: Which is also referred to as DX-8627.  
8 Correct?

9           MR. BERNICK: Yes. I know your Honor is going to  
10 rule, but just for the sake of clarity, I did make a mistake  
11 when I made a representation to the Court that Dr. Marx  
12 referred to the Pauley deposition as being part of her reliance  
13 materials. That was mistaken. What I misremembered is that by  
14 the time she was deposed she had read it. And the testimony is  
15 at her deposition page 131, lines 17 to 22. That's what I was  
16 recalling, and I was mistaken to have said it was in her  
17 original report, because she was deposed -- she -- her report  
18 came out, then we took Mr. Pauley's deposition, then she  
19 testified, and by that time she had read Mr. Pauley's  
20 deposition. So she was familiar with it.

21           THE COURT: You're talking now when you took her  
22 deposition?

23           MR. BERNICK: When I took her deposition --

24           THE COURT: It was after the Pauley deposition?

25           MR. BERNICK: After Mr. Pauley's deposition.

1 THE COURT: Right.

2 MR. BERNICK: And I asked her about it. And the only  
3 thing I would say is that, again, we really wanted to call Mr.  
4 Pauley here to testify, and it's only the plaintiffs' election  
5 not produce him, otherwise he could respond.

6 THE COURT: When she was deposed, was she asked about  
7 Mr. Pauley's chart, about the chart, Exhibit 23?

8 MR. BERNICK: Yeah, I asked extensive questions  
9 regarding Mr. Pauley's testimony -- "extensive" is probably in  
10 the eye of the beholder -- I specifically asked about Mr.  
11 Pauley's testimony. I used it to talk about negotiations --

12 THE COURT: In her answers did she at any time say:  
13 This chart was not an accurate reflection?

14 MR. BERNICK: No. What she said was she had not seen  
15 it before --

16 THE COURT: Right.

17 MR. BERNICK: -- or she hadn't studied it. And I then  
18 asked her whether the model could explain the differences that  
19 are shown, and she couldn't say.

20 THE COURT: Okay. How long ago was her deposition?

21 MR. BERNICK: It was in 2013. I think it was in --  
22 November of 2013.

23 THE COURT: All right. Mr. Johnson, do you have  
24 anything else you want to say?

25 MR. JOHNSON: No. I think --

1           THE COURT: By the way, I have not -- I have not found  
2 in the Pretrial Order where you objected to this exhibit.

3           MR. JOHNSON: We'll get that for you.

4           THE COURT: When?

5           MR. JOHNSON: We have it --

6           THE COURT: Well, it's not in there. So, I had my  
7 clerks look for it, I've looked for it personally, it's not  
8 there. It should be on page -- it should be on page 10 of the  
9 Final Pretrial Order but it's not there.

10          MR. JOHNSON: I'm told that the exhibit list in the  
11 Pretrial Order did not contain all the objections from either  
12 side.

13          THE COURT: Well, it's not there as far as I'm  
14 concerned.

15          MR. JOHNSON: Yeah.

16          THE COURT: Even if it were there, okay, even if it  
17 were there I'd still have to rule on its admissibility today.  
18 Just because it's not there -- so I still would have to rule.

19          Look --

20          MR. JOHNSON: I --

21          THE COURT: Go ahead.

22          MR. JOHNSON: Just if I may, you asked me for my  
23 comments. I knew that Mr. Bernick had misstated the record  
24 with respect to the expert witness and, you know, he corrected  
25 that. I appreciate that.

1 THE COURT: Okay.

2 MR. JOHNSON: As reflected, she at the time of her  
3 deposition had seen the Pauley dep, but she had not had the  
4 opportunity to study that chart or what its meaning was. It's  
5 a rather complicated chart, she had not done that yet. And  
6 so --

7 THE COURT: Okay.

8 MR. JOHNSON: -- she hadn't had a chance to do that at  
9 the time. And so we did, even though it's not in the Pretrial  
10 Order, we had objected to that and objected to that whole line  
11 of testimony, frankly, in Mr. Pauley's deposition.

12 THE COURT: Well, the first objection I heard about  
13 this was, I think, the day before trial began when Mr. Bernick  
14 wanted to use this as part of his opening. I was not aware of  
15 this particular exhibit being objected to by plaintiffs.

16 MR. JOHNSON: No, nor did we bring any of our document  
17 objections to you at that time. You may remember you assigned  
18 all the deps to Judge Pisano to deal with testimony.

19 THE COURT: Let's not go there. I assigned them  
20 because you fellows were not prepared for this case for trial  
21 on March 7. I made it very clear early on. You did a pretrial  
22 conference in June which was a joke. I don't think you ever  
23 believed, either side, you were going to trial on March 7th. I  
24 think you still thought, oh, we're just going to kick around  
25 this case. Okay?



1           MR. JOHNSON: I was pretty certain we were, your  
2 Honor.

3           THE COURT: Maybe you were, only after I finally said,  
4 we're bringing Judge Pisano on to this because I couldn't  
5 possibly get this case ready with all these video depositions,  
6 because it wasn't prepared by either side here.

7           MR. JOHNSON: I --

8           THE COURT: You don't have to -- let's not go into it.  
9 But you brought it up. You brought it up; I'm responding to  
10 it.

11           This is not the way I would have prefer to do have  
12 this case tried. There's too many videotaped depositions,  
13 there were a lot of things that were pending too long. The  
14 purpose of a Final Pretrial Order is to have ironed out most of  
15 this stuff, and it wasn't done --

16           MR. JOHNSON: We agree.

17           THE COURT: -- on both sides. To a certain extent on  
18 both sides.

19           This is a different situation than the other ones I've  
20 rule on.

21           You can sit down, Mr. Johnson.

22           It's pretty apparent to me that this chart was in the  
23 possession of a plaintiff for maybe some years. You just  
24 admitted Dr. Marx testified at her deposition, she looked at  
25 it, she saw the chart. If she had any problems with it she had

1 over a couple of years to express those problems in some type  
2 of a meaningful way that it would have been brought either to  
3 Judge Falk in the pretrial conference or to me, and that didn't  
4 happen here.

5 In addition, this chart was referred to at the  
6 deposition. Mr. Pauley's testimony would be meaningless if the  
7 jury didn't see this chart.

8 Now, I allowed them to see it and I allowed it to be  
9 at least initially demonstrative, but this will go in evidence.  
10 This chart is one that the plaintiffs were aware of for maybe  
11 years; I don't know. 2013 she was deposed?

12 If she had an issue with the data in this chart she  
13 could have expressed it months, if not years ago, and that  
14 didn't happen with respect to this case. Which is different  
15 than my rulings in the other case because I was satisfied in  
16 the other case you didn't get the charts in the timely fashion.

17 And also, when Mr. Bernick asked Mr. Pauley questions,  
18 I'm satisfied from the questions that what he said is, after  
19 Mr. Pauley testified to something he saw in the chart, he asked  
20 him, could you insert the following in this area. And it was  
21 consistent overall with what Mr. Pauley was saying.

22 Now, you have the statement of Dr. Marx saying this is  
23 not accurate, and, you know, so this is an issue that goes to  
24 the weight. If in your summation you want to make an issue of  
25 this, you'll have Dr. Marx's statement saying this is not

1 accurate, Mr. Bernick will say it is accurate, and that's what  
2 trials are all about.

3 So this will be in evidence. Okay.

4 MR. JOHNSON: Your Honor, there was another exhibit  
5 that was 18, which was the other chart that he had Mr. Pauley  
6 write stuff on.

7 MR. STREETER: DX-8622.

8 THE COURT: Let me see that, because for some  
9 reason -- can you pull it up?

10 MR. STREETER: 8622. It's this one, it's a similar  
11 scenario and there's no controversy about the line. It's just  
12 things that Mr. Pauley wrote on it during the deposition in  
13 response to questions.

14 THE COURT: I'll allow it. There is no issue with  
15 respect to the line here. Correct, Mr. Johnson?

16 MR. JOHNSON: No.

17 MR. STREETER: The only other thing with respect to  
18 Pauley is there were two exhibits that they objected to, which  
19 were trade journals.

20 THE COURT: Right.

21 MR. STREETER: And I think your Honor's ruling is that  
22 these would be admitted not for the truth but to show that the  
23 context in the market applies to these as well. I believe that  
24 they agree.

25 THE COURT: I ruled on one for sure. I ruled on the

1 one in your right hand I believe. Correct?

2 MR. STREETER: There's DX-3844 and DX-8630.

3 THE COURT: Well, I recall ruling on that one I  
4 believe.

5 MR. STREETER: I think this one just came up with Mr.  
6 Dawson. There was one other which is 8630 which is another  
7 trait journal which Mr. Pauley was asked about.

8 THE COURT: This came up with Mr. Dawson? No.

9 The one that came up with Mr. Dawson I allowed him  
10 only to testify to the paragraph in which he was quoted.

11 MR. STREETER: Okay.

12 THE COURT: That one is not going into evidence.

13 MR. BERNICK: I think that these were actually -- the  
14 way they were is that they were used in the Pauley --

15 MR. STREETER: These two were used in Mr. Pauley's  
16 deposition because I understand the plaintiffs' position on  
17 these is they can come in as long as it's just for market  
18 context, not the truth of the matters asserted.

19 Am I right?

20 MR. JOHNSON: That's right. Is that the one that --

21 MR. STREETER: These are the two Pauley --

22 MR. JOHNSON: That he's quoted --

23 MR. BERNICK: No.

24 MR. JOHNSON: Those two we are fine with, your Honor

25 THE COURT: The one that Mr. Dawson was quoted in, I

1 ruled that the quote can be obviously, it's his quote, and that  
2 could go to the truth of the matter obviously.

3 MR. BERNICK: Right. And that's a different article  
4 from these, and I understood your Honor's ruling.

5 MR. JOHNSON: And we agree that those would come in  
6 subject to your limiting instruction.

7 THE COURT: Yeah, okay. And I gave a limiting  
8 instruction, as least as to one I did. Okay.

9 MR. STREETER: One more housekeeping matter.

10 THE COURT: Go ahead.

11 MR. JOHNSON: Are you ruling that 18 is going to be  
12 allowed in even with the handwritten notations on it?

13 THE COURT: I am, Mr. Johnson. They were his  
14 handwritten notations during the deposition, so they're  
15 relevant.

16 Go ahead.

17 MR. STREETER: A housekeeping matter. Number one,  
18 I've got a list that the plaintiffs agreed to of the exhibits  
19 that were put in with Mr. Ho which I'll hand to your clerk; and  
20 I've got a list of the exhibits that were admitted in light of  
21 your Honor's rulings just now with respect to the Pauley  
22 deposition.

23 THE COURT: Okay. All right. So you'll hand those  
24 up.

25 There's no objection to the ones? You've had a chance



